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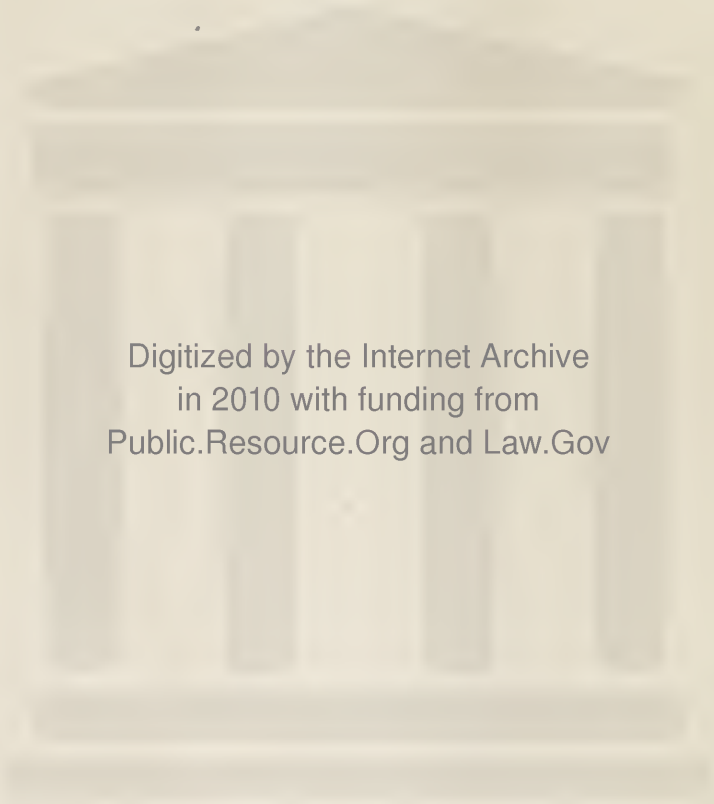
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No. 2719

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

JOSEPH E. WISE and LUCIA J. WISE, Appellants,
 vs.
 CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN, Appellees,
 and
 CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr., Appellants,
 vs.
 JOSEPH E. WISE and MARGARET W. WISE, Appellees,
 and
 JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN, Appellants,
 vs.
 JOSEPH E. WISE and MARGARET W. WISE, Appellees,
 and
 SANTA CRUZ DEVELOPMENT COMPANY, a Corporation, Appellant,
 vs.
 CORNELIUS C. WATTS, DABNEY C. T. DAVIS, Jr., JOSEPH E. WISE, MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN, Appellees.

VOLUME II.
(Pages 321 to 647 Inclusive,)

Upon Appeals from the United States District Court for the District of Arizona.

Filed

JAN 2 1916

F. D. Monckton,
Clerk.

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BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN
LEE BOULDIN,
and
CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,
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JOSEPH E. WISE and MARGARET W. WISE,
and
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MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN,
and HELEN LEE BOULDIN,

Appellants,
Appellees,
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Appellant,
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VOLUME II.
(Pages 321 to 647 Inclusive,)

Upon Appeals from the United States District Court for the District
of Arizona.

QUITCLAIM DEED.

THIS INDENTURE, Made the 24th day of April, in the year of our Lord One Thousand Nine Hundred and Seven between Wilbur H. King of Hokins County, Texas, the party of the first part, and Joseph E. Wise of Santa Cruz County, Territory of Arizona, the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One Thousand Dollars of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released and quit-claimed, and by these presents does convey, remise, release and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following described real estate and property situated in the County of Santa Cruz and Territory of Arizona, to wit:

That certain Private Land Claim, known and called "Baca Float or Location No. 3," containing one hundred thousand (100,000) acres more or less, being one of the five blocks or tracts of land selected by the heirs of Luis Maria Baca under the provisions of an act of the Congress of the United States of date June 21st, 1860, and set forth in full in Vol. 12 U. S., Statutes at Large, page 72; said tract or parcel of land being more particularly bounded and described as follows, to wit: Commencing at a point one

mile and a half from the Salero Mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point west twelve (12) miles, thirty-six (36) chains and forty-four (44) links; thence south twelve (12) miles, thirty-six (36) chains and forty-four (44) links; thence east twelve miles, thirty-six (36) chains and forty-four (44) links; thence north twelve (12) miles, thirty-six (36) chains and forty-four (44) links to the place of beginning.

and also all of the right, title and interest acquired by said Wilbur H. King under and by virtue of a certain sheriff's sale made by the sheriff of Pima County, Arizona Territory, under a certain execution tested July 3d, 1895, [284] issued upon a certain judgment rendered on May 2d, 1895, by the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in favor of John Ireland and Wilbur H. King and against Leo Goldschmidt, Administrator of the estate of David W. Bouldin, deceased.

TO HAVE AND TO HOLD the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part, either in law or in equity, in possession or expectancy to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the

first part has hereunto set his hand and seal the day and year first above written.

W. H. KING. (Seal) [285]

Defendants Wise Exhibit 25.

Defendants Wise introduced in evidence a deed dated and acknowledged the 8th day of April, 1907, and recorded May 2, 1907, from Mrs. A. M. Ireland, the widow of John Ireland, to Joseph E. Wise, conveying all of the grantor's right, title and interest, claim and demand, to Baca Float No. 3 by the 1863 description, which was specifically set forth in the deed.

Defendants Wise Exhibit 26.

Defendants Wise offered in evidence a deed dated the 5th day of October, 1914, between John Nelson, sheriff of the county of Pima, State of Arizona, and Joseph E. Wise, executed under the order of the Superior Court of Pima County, in the matter of the case of Ireland and King vs. David W. Bouldin, Leo Goldschmidt as administrator.

Counsel for defendants Bouldin and counsel for plaintiffs objected to the introduction in evidence of said instrument on the grounds heretofore made to the introduction in evidence of the transcript of record in the case of Ireland and King vs. Bouldin and Leo Goldschmidt, administrator, and supplemented with the further objection that the Court had no power to order the sheriff of Pima County to execute the said deed.

Said instrument was received in evidence subject to said objection, marked by the clerk "Defendants Wise Exhibit 26," and is set forth in the appendix

which is part of this record.

Defendants Wise Exhibit 27.

Defendants Wise offered in evidence certified copy of the record of a deed from Teofila Baca, daughter of Jose Baca, deceased, and Felix Baca, her husband, to Marcos C. de Baca, dated August 20, 1913, acknowledged August 23, 1913, and recorded August 29, 1913, which without the statement of parties, [286] *habendum*, signatures and certificates of acknowledgment and record, and after describing the property conveyed as Baca Float No. 13, by the courses and distances of the 1863 location, reads as follows:

“being the same premises that descended to the parties of the first part as children of Jose Baca, who was the son of Juan Manuel Baca, who was the son of Antonio Baca, who was the son of Luis Maria Baca, and one of the heirs to whom said grant was made by the act of Congress of the United States of America on the 21st day of June, 1860.”

Plaintiffs and defendants Bouldin and Santa Cruz Development [287] Company renew at this time the objections they heretofore made as to all the deeds which purported to convey the interest of Antonio Baca.

The COURT.—Received subject to the objection.

Defendants Wise Exhibit 28.

Defendants Wise offered in evidence certified copy of the record of a deed from Ciriz Salazar to Joseph E. and Jesse H. Wise, dated and acknowledged the 8th day of August, 1913, and recorded

September 15, 1913, which without the statement of parties, *habendum*, covenants, signatures and certificates of acknowledgment and record, and after describing the property conveyed as "Baca Float or Location No. 3" by the courses and distances of the 1863 location, reads as follows:

"Being the same premises that descended to the parties of the first part hereto as children of Nicolasa C. de Baca who was the daughter of Juan Antonio de Baca, who was a son of Luis Maria C. de Baca to whom said grant was made on the 21st day of June, by an act of Congress of the United States of America."

Plaintiffs and defendants Bouldin and Santa Cruz Development Company made the same objection as to all other deeds which purported to convey the interest of Antonio Baca, or of his descendants.

Received subject to said objection.

Testimony of W. F. Skillman.

The deposition of W. F. Skillman, a witness on behalf of defendant Joseph E. Wise, which had been duly taken and duly returned to this Court, was then introduced in evidence by defendant Joseph E. Wise. Said witness having been duly sworn testified as follows:

My name is W. F. Skillman; age 47 years; residence is [288] Sulphur Springs, Texas. I knew Wilbur H. King during his lifetime; I met him first at Sulphur Springs, Texas, about the year 1880, and knew him until his death. Most of that time he resided or made his headquarters at Sulphur Springs, Texas. Wilbur H. King is dead; he died at Sulphur

(Testimony of W. F. Skillman.)

Springs, Texas, on or about the 10th day of October, 1910. I was the administrator of his estate and was appointed to the position by the Probate Court of Hopkins County, Texas. I was appointed administrator of said estate October 13, 1910; the administration was made permanent by the January term of the court, 1911. I have heard Wilbur H. King say that he had been married and that his wife was dead. I never knew his wife. He never lived with a wife here, and it was always the common opinion that he had been married and his wife was dead. Her death occurred sometime prior to his moving to Sulphur Springs, Texas. I do not know where she died, but from his conversation I formed the opinion that he married sometime soon after the Civil War, and that his wife did not live very long after their marriage. I have heard Wilbur H. King say that he and his wife had one child born to them and that the said child died during babyhood. He never had any child with him during my acquaintance with him. I do not know when nor where the child died. I never knew of any child or natural heir that Wilbur H. King had, except as above stated. When I was ready to distribute his estate, Mrs. Nora B. Bruner, of Corsicana, Texas, a relative by marriage, to the said Wilbur H. King, made affidavit that he died without children, and on this proof, I distributed the funds that I had in my hands as administrator of his estate, to his brothers and sisters and their heirs. I never was acquainted with John Ireland. If Wilbur H. King and John Ireland were law partners, I never [289] knew it.

Defendants Wise Exhibit 29.

Defendants Wise then offered in evidence the opinion of Secretary Lamar, of date June 15, 1887. This opinion is reported in 5 L. D. 705, and is the same as Plaintiffs' Ex. K-13.

Defendants Wise Exhibit 30.

Defendants Wise offered in evidence a letter from John W. Cameron to Levi H. Manning, Surveyor General of Arizona, dated June 9, 1893, which reads in part as follows:

“An amended application was filed, and the Land Office on May 21, 1866, issued instruction for the survey as amended. It is this location that should be surveyed. * * *

In April, 1864, Commissioner Edmunds sent instructions to the Surveyor General of Arizona to make survey, but required the owners to advance the money to pay for the same, a condition not to be found in the act, nor in any law of Congress. In 1866 another order to survey the corrected location was made, but the same condition was imposed. The validity of the location was passed on by the Secretary of the Interior. * * * The Government solemnly contracted that the Surveyor General should survey the claim whenever required by the heirs or their assigns. They have required it, and it not having been done, they now require it again.
* * *

Now therefore, in accordance with the act of Congress, and as one of the owners of this claim

Baca No. 3, and representing all of them, I hereby require of you to make survey of said amended location, in accordance with the law and your duties thereunto.”

Defendants Wise Exhibit 31.

Defendants Wise offered in evidence a letter from S. M. Stockslager, Commissioner of the General Land Office, to John Hise, Surveyor General of Arizona, dated March 5th, 1889, denying application of John C. Robinson for a survey of the 1866 location, but ordering a hearing to determine whether it was known to be mineral when selected. [290]

Request by Defendants Wise That Counsel for Plaintiffs Produce a Certain Statement of Prudencio Baca, Son of Luis Maria Baca.

During the progress of the trial and before Marcos C. de Baca, a witness on behalf of defendants Wise, was called and examined in the case, Mr. Franklin requested the plaintiffs to produce the original statement made by Prudencio Baca in 1879 as to the heirs of Luis Maria Baca.

Mr. KINGAN.—We never had the original statement of Prudencio Baca. I never told Mr. Franklin we had the original statement. We have a copy certified by the clerk of the court, which I understand Mr. Franklin has also.

Mr. FRANKLIN.—Mine is not certified to.

Mr. KINGAN.—If he hasn't it, he could get it as easily as we could. It is a public record. We have no original statement of Prudencio Baca, and I never said so.

Mr. FRANKLIN.—Then I misunderstood about

it being an original. You have a certified copy?

Mr. KINGAN.—Surely, we have a certified copy of the court record up there, which is open to the world, which he can get as well as we can.

The COURT.—I don't know of any authority that would require them to do that. I don't think I shall require them to do that.

Testimony of Marcos C. De Baca.

MARCOS C. de BACA was called as a witness on behalf of the defendants Joseph E. Wise and Lucia J. Wise, Jesse H. Wise and Margaret W. Wise, and having been first duly sworn was examined and testified as follows:

Direct Examination. [291]

My name is Marcos C. de Baca; I will be fifty-eight years old on the 25th of next month; I live in Bernalillo, New Mexico; I have lived there for the last ten years; I have lived all my lifetime in the State, heretofore Territory of New Mexico; I was born at Pena Blanca, New Mexico. By profession I am almost everything from a small farmer to a poor lawyer. I am admitted to practice before the Courts of New Mexico as an attorney at law; I have been a member of the profession since 1891. I am a descendant of Luis Maria Baca—Luis Maria Cabeza de Baca—I am a great grandson. I was acquainted with Tomas Cabeza de Baca in his lifetime; he was my father; my attention is called to an ancient deed being marked Plaintiffs' Exhibit "C," and I am directed to look at the signature of "Tomas C. de Baca" to that deed; that is the signature of my father. My grandfather was Juan An-

(Testimony of Marcos C. de Baca.)

tonio Cabeza de Baca. My attention is directed to the fact that there is a Juan Antonio Cabeza de Baca recited in the deed of 1864, that he was dead at that time, and Tomas C. de Baca is recited as his son. That Tomas C. de Baca was my father. I will state right now that my father's name was Francisco Tomas de Baca, and he used to sign his name many times "Francisco," and sometimes he used to sign it "Tomas Baca" alone. I know who the descendants of Luis Maria Cabeza de Baca are. During the past years—since 1875—I have made a study as to who the sons of Luis Maria Cabeza de Baca were. The particular reason when I started it was because I wanted to keep a full record of the whole family. That was the first object of it and afterwards it was for the object of finding out the heirs of Luis Maria Cabeza de Baca in some partition suits that were brought against the heirs for some land that he owned in New Mexico. There was filed in the partition [292] suit for Baca Location No. 1 a family tree of Luis Maria Cabeza de Baca. I think I have a copy of that paper.

Mr. FRANKLIN.—I will ask, your Honor, some more preliminary questions to show the knowledge and source of knowledge of this witness and produce the authorities at 1:30.

Q. Mr. Baca, you are the same Marcos C. de Baca to whom divers and sundry persons who claim to be descendants of Antonia Baca made certain deeds that I put in evidence, being exhibits in this case? You have heard me read them? A. Yes, sir.

(Testimony of Marcos C. de Baca.)

Q. We will come to the following named persons and state whether or not you know them: First, Juana L. Baca, Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca and Inez Lucero who was the daughter of Epigmenia Baca.

Mr. KINGAN.—We do not like to object, but he is certainly leading the witness, putting names in the witness' mouth.

Mr. KRANKLIN.—Your Honor, these people all deeded to him in a deed, and I am asking him if he knew the people who deeded to him.

The COURT.—The objection is that you are stating that someone is an heir.

Mr. FRANKLIN.—Your Honor, these people all out. I was just simply going a little more in detail in regard to these people who signed the deed.

The COURT.—That is objectionable but I think it is immaterial.

Mr. CAMPBELL.—May we have an objection to all this line of testimony the same as we made to the deeds; that it is immaterial, incompetent, for the reason that he claims under the deed of 1864 from the Baca heirs and the deed of 1871; and [293] therefore, he is bound by the recitals as to who the heirs are.

The COURT.—The objection is overruled and I will hear you in argument.

Mr. NOBLE.—May we have the same objection and exception, if the Court please?

The COURT.—On the part of the plaintiffs?

Mr. NOBLE.—Yes, sir.

(Testimony of Marcos C. de Baca.)

Mr. BREVILLIER.—And on the part of the Santa Cruz Development Company.

To which ruling of the Court, the plaintiffs, the defendants Bouldin, and the defendant Santa Cruz Development Company, then and there duly accepted.

Question was repeated to the witness as follows:

Q. We will come to the following named persons and state whether or not you know them: First, Juana L. Baca, Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca and Inez Lucero; do you know those people?

WITNESS.—I know them well.

Question. Are they related to you in any way?

A. Yes, sir. Juana Lucero Baca is the widow and Preciliana and the others are children of Jose Baca.

Witness further testified: I did not know Jose Baca in his lifetime; he was related to me. I did not know the father of Jose Baca in his lifetime.

Question. Have you had any conversation with the children of that Jose Baca or with Jose Baca himself or with any other members of the family as to who the father of Rose Baca was?

A. I had a conversation with my father and with Jose Baca himself.

The witness was here temporarily withdrawn.

Before the witness was recalled the following proceedings [294] took place in open court and the following requests and statements were made by respective counsel and by the Court in regard to the purported statement of Prudencio Baca, a son of

(Testimony of Marcos C. de Baca.)

Luis Maria Baca, to wit:

Mr. FRANKLIN.—Then, your Honor, I am going to make a request of the Court, and that is I am going to ask the Court to give me time within which to file as part of the evidence in this case a certified copy of the statement of the heirs that was filed in that lawsuit in New Mexico against Prudencia Baca, which certified copy these gentlemen have now. I never knew, I was under the impression he had an original paper; I did not know what that was or where it came from. I think I can hardly be charged with notice and knowledge of everything that is in the State of New Mexico. My object and purpose being, of course, to put that paper in. In a matter of this kind I think the Court desires to get at the real and correct facts, and it is a part of the testimony of this witness. If there are any documents to be had on this subject in any court, if the gentlemen will only name the court and name the proceeding where they might have been, I will get a certified copy and file it.

Mr. NOBLE.—With respect to the specific statement Mr. Franklin makes reference to, he is entirely in error in thinking it was filed in any proceeding. The statement that he has referred to is the statement prepared by one of the lawyers in a lawsuit—not made by any witness—made by an interested party, one of the lawyers—that paper right there.

Mr. FRANKLIN.—Mr. Kingan told me that he had, as I understood him, that he had a paper signed by Prudencio Baca, a son, in 1878. He asked me

(Testimony of Marcos C. de Baca.)

whether I would consent, or rather, admit the fact that he died, that he was dead. I found [295] out that he was dead; he died in 1882. I told Mr. Kingan I would agree to this fact, that Prudencio was dead, which would make his statement as an ancient document admissible.

Mr. KINGAN.—You misunderstood what I had, Mr. Franklin. I told you I might want to use a statement made by Prudencio Baca, and that, if we did want to, would you stipulate that he was dead. That is what I asked you; and you said that you would write up there and find out if he was dead, and if so, you would stipulate. That is the extent of our stipulation. I never told you that I had the original paper. I told you that I had a paper that I might want to introduce. You may have misunderstood it.

Mr. FRANKLIN.—I intend to ask if there is anything anywhere in New Mexico on this subject, for an opportunity to get it.

Mr. BREVILLIER.—May I make a slight suggestion. I suppose Mr. Franklin will show us the paper of which he has a copy and of which he asks leave to file a certified copy. This is the first time I have ever heard of it.

Mr. FRANKLIN.—I cannot say now. This was given to me by Mr. Marcos Baca. Whether it was filed in that case or not filed in that case I am not sure. I am perfectly willing to show you what I have.

The COURT.—Upon objection of all counsel in

(Testimony of Marcos C. de Baca.)

this case I overruled an application for a continuance made by one of the defendants, and I do not feel like continuing the hearing. At the same time, I can readily see if you introduce testimony a week from now, or two weeks from now, after these gentlemen have all returned to their respective homes and all the witnesses have returned, it might cause a reopening of the case. I am willing that counsel representing any of the defendants [296] may file certified copies of papers that were not certified, or in any way to perfect the record, but I could not hold the case open for further testimony, after having declined to continue it on application of one of the defendants.

The witness Marcos C. de Baca resumed the stand and further testified as follows:

Direct Examination Continued.

I was well acquainted with some of the sons of Luis Maria Baca in their lifetime; I was personally acquainted with the following sons of Luis Maria Baca, namely: Prudencio Baca, Jesus Baca the first, Jesus Baca the second, Josefa Baca y Lucero, Domingo Baca and Manuel Baca. None of these sons is living at the present time. Every one of them is dead. Prudencio Baca died in March, 1882. I could not state the time when the two Jesuses died; they died in Sandoval County, about probably in '68 or '70. I am not positive though, but they have been dead a number of years. Josefa Baca y Lucero was the daughter, she died in 1888. I am not positive when Domingo Baca died, I think he died

(Testimony of Marcos C. de Baca.)

in 1892. Manuel Baca died in 1905. I had conversations with four of the deceased sons and daughters above mentioned, all except the two Jesuses. I had conversations with Prudencio, with Josefa Baca y Lucero, with Domingo Baca and Manuel Baca.

Question. Now, in the conversation with Prudencio Baca, was anything said by him in regard to who the sons and daughters of Luis Maria Baca were?

Mr. NOBLE.—I would like to interpose an objection at this point. We are not interested in knowing who the sons and daughters of Luis Maria Cabeza de Baca were except for one reason; to see if they had a right to give these deeds to Mr. Baca, who in turn had given them to Mr. Wise. This is the whole question. Now, before this witness can answer that question [297] they have got to bring themselves within the rule which must exclude the possibility of their having left a will and deeded away the property, or otherwise disposed of it. That is the very point of the rule.

The COURT.—Well, I am admitting it under that rule, and if it does not comply with the rule I shall not admit it, for any purpose whatever.

To which ruling of the Court the plaintiffs herein and the defendants Santa Cruz Development Company then and there duly excepted.

Mr. KINGAN.—We desire the further objection, if the Court please, that he must show first that at the time of the declarations concerning which he is

(Testimony of Marcos C. de Baca.)

about to testify the parties making them were absolutely disinterested.

The COURT.—Well, as I understand the rule, before declarations of persons can be admitted to prove pedigree, it is essential that three facts be established by the evidence, by legal evidence; namely, first, that the declarant is dead or that his testimony is unobtainable. That is the first requisite. Second, that the declarant was related to the family to which the declaration refers by blood or marriage. That is the second requisite. And third, that the declarations were made *ante litem motam*, that is to say, before the controversy about the pedigree in question arose.

Mr. WELDON M. BAILEY.—May it be noted that the Bouldin defendants join in the objection to this testimony, and we save an exception?

The COURT.—Yes.

To which ruling of the Court the defendants Bouldin then and there duly excepted.

WITNESS.—I had conversations with Prudencio Baca in regard [298] to who were the sons of his father, Luis Maria Baca, at different times; I had many conversations prior to his death.

Question.—Now at the time you had these conversations, was there any controversy that you know of as to whether or not Antonio Baca was or was not a son of Luis Maria Baca.

A. I never knew any controversy between the family.

WITNESS.—I heard of some controversy, but not

(Testimony of Marcos C. de Baca.)

in the family of course, It was a controversy between the wife of Antonio Baca and Luis Maria Cabeza de Baca; the controversy was on account of some claim that her children should inherit from Luis Maria Cabeza de Baca. This lady was Francisca Garviso; she was a daughter-in-law to Luis Maria Baca; she was the wife of Antonio Baca; the first child of Luis Maria Baca; she was the wife of Antonio Baca; this Antonio Baca is the Antonio that Mr. Wise is now claiming was the son of Luis Maria Baca, the same man and she the wife of Antonio Baca. She had a controversy with Miguel Baca who was the administrator of Luis Maria Cabeza de Baca—the original Don Luis; if my memory tells me correct, I think the controversy was before the Governor of the Territory at that time; it was not before any Court to my knowledge. I cannot tell you how the Governor had anything to do with it; so far as I know, I could not say whether the Governor had anything to do with it; I am acquainted with the laws of New Mexico but I couldn't tell you what were the laws of New Mexico at that time. Luis Maria Cabeza de Baca died in 1827, and I have not never [299] gone back. My knowledge about this controversy is on account of the paper which my father had, in this paper which I have to-day that controversy must have been before New Mexico was part of the United States; a good many years before; I think it was in 1829, I am not positive sure about the date; it must have been in 1828 or 1829 or probably the latter part of 1827. Antonio, the

(Testimony of Marcos C. de Baca.)

alleged son, was dead at the time that his wife had this controversy.

Mr. FRANKLIN.—Can you state in any way what this controversy was? Do you know what it was?

Mr. NOBLE.—Before the witness answers, I would like to inquire on the *voir dire*.

By Mr. NOBLE.—What are those papers that you are using there?

A. I am using a petition that was presented by the administrator of Luis Maria Cabeza de Baca to the Political Chief of New Mexico at that time; it is a copy of the original paper which I have at home. [300]

It is in Spanish. I got it from the papers of my father. I made the copy myself.

Examination of the Witness Continued.

By Mr. FRANKLIN.—I never heard of a controversy as to whether or not Antonio Baca was or was not a son of Luis Maria Baca. There was no controversy before the Governor of New Mexico of the Mexican Republic as to who the children of Luis Maria Baca were, or the grandchildren of Luis Maria Baca. As I have been informed the controversy was between the wife of Antonio Baca and the administrator of Luis Maria Baca, the original Luis Maria.

Q. State what the controversy was if you know.

Mr. NOBLE.—Subject to our objection.

WITNESS.—From my information?

(Testimony of Marcos C. de Baca.)

Mr. FRANKLIN.—Certainly, from your information.

WITNESS.—My information was that the controversy was about some inheritance that Francisca Graviso claimed from the administrator of Luis Maria Cabeza de Baca, that was coming to her through her father and Antonio Baca pertaining to her children, that she had, Juan Manuel Baca.

Q. State what the controversy was, if you know. Controversy that she, as the wife of Antonio, was not entitled to whatever it was she claimed?

Mr. NOBLE.—Same objection.

The COURT.—Same ruling.

A. It was on account of some debts that Antonio Baca was owing at the time of his death to Luis Maria Cabeza de Baca.

Mr. FRANKLIN.—Q. On account of some debts. Was it in regard to any will of Luis Maria Baca?

A. No, sir. [301]

Q. Was it in regard to any interest that Antonio Baca had in the estate of his father as an heir? I mean to say as coming to him as an heir? A. No.

Q. It was in regard to debts?

A. It was merely debts that Antonio Baca was indebted, when he died, to Luis Maria Cabeza de Baca.

Q. Do you know whether Luis Baca left a will when he died? A. I think he did.

Q. Do you know where that will is?

A. I think—I couldn't say whether it is the original will or a copy of the will, but the will is

(Testimony of Marcos C. de Baca.)

filed in the Surveyor General's office in Santa Fe.

Q. You say there was a copy filed; you say that there was a copy filed?

A. No, I say that I don't know whether it is the original or a copy.

Q. Do you have any copy of that paper?

A. I have a copy of the paper; yes, sir.

Q. Do you have it with you? A. Yes, sir.

Q. Will you please produce it? (Witness produces paper.)

Q. Did you either make that or compare that copy with the original yourself?

A. I took it from a certified copy that my father got from the Surveyor General's office.

Q. That is a copy of a certified copy?

A. This is not a certified copy, but I got it from the certified copy. The certified copy that I got is filed in the District Court of Sandoval County in a partition suit that was brought there some time ago; that was thirty-five years ago. It is over there in that court, the original,—I mean the certified copy that I brought. [302]

Mr. NOBLE.—Q. When was that partition suit brought? I did not quite catch that.

A. The first suit was brought for the partition of the Baca location, you mean?

Q. Yes.

A. That was brought in 1875 I think. It was in '75 or '76.

Mr. FRANKLIN.—Q. Is that in Spanish?

(Testimony of Marcos C. de Baca.)

A. Yes, all these papers were in the certified copy of that will.

Q. You say you made this yourself?

A. Yes, sir.

Mr. FRANKLIN.—We will offer in evidence this copy.

Mr. KINGAN.—Let us see it.

Mr. FRANKLIN.—It is in Spanish. It won't do you much good.

The COURT.—Perhaps counsel can read it or have it read to them.

Mr. FRANKLIN.—We will have the gentleman read it with the permission of the Court.

The COURT.—I say counsel may be able to read it or understand it, or have it read to them.

Mr. NOBLE.—We can make out what it says, your Honor.

Mr. FRANKLIN.—Mr. Baca, do you have with you the paper which purports to be a copy of the will of Luis Maria Baca? A. Yes, sir.

Q. Are you a Spanish scholar; do you know the Spanish language?

A. That is my mother-tongue.

Q. And you are perfectly competent to translate Spanish into English or English into Spanish?

A. I would not say I am very competent. I have been translator in the land office of New Mexico for three years.

Q. Official translator in the land office of New Mexico? A. Yes, sir. [303]

(Testimony of Marcos C. de Baca.)

Q. Now, have you made a translation of that will or alleged will and petition which were offered in evidence yesterday, an English translation?

A. Yes, sir.

Q. This is it, is it not? (Showing papers to witness.)

A. Yes, sir, that is it.

Mr. FRANKLIN.—I have made typewritten copies of this, your Honor, and will give the gentlemen typewritten copies. I would have done so before but it was not finished until ten minutes ago. So that they can see what is in this document in English. Shall I give it to your Honor to read or shall I read it out loud so that they can all hear it?

Mr. BREVILLIER.—The original is offered in evidence?

Mr. FRANKLIN.—The original is offered in evidence.

Mr. BREVILLIER.—For what purpose?

Mr. FRANKLIN.—Well, now, yesterday, this gentleman said that the law was that a man is presumed to die testate, and believing at that time that that was the law I endeavored to get this copy of the will. I find now it is not the law. It makes no difference; one is presumed to die intestate. I offer it simply as a matter of good faith, because I offered it yesterday. You can take it or can let it alone.

Mr. BREVILLIER.—I object to this paper as incompetent, irrelevant and immaterial.

(Testimony of Marcos C. de Baca.)

The COURT.—I don't understand it has been offered.

Mr. FRANKLIN.—I offer the original and this translation your Honor. They are copies of a certified copy of what purports to be the will of Luis Maria Baca. I made the offer of the original. They do not object, I presume, to the translation.

Mr. BREVILLIER.—There is no objection to the translation.

Mr. FRANKLIN.—I have the original here. That is the copy. [304]

Mr. BREVILLIER.—It does not throw any light on this question of heirship.

Mr. BAILEY.—It will not do any harm. Why not let it go in and save time?

Mr. BREVILLIER.—I cannot tell what this is going to lead up to. I don't see that this has anything to do with the heirship of Antonio Baca.

The COURT.—Do you think it is material, Mr. Franklin?

Mr. FRANKLIN.—Your Honor, if your Honor should hold it incumbent upon us to prove testacy it is material. If your Honor should hold that in the absence of any such proof—and I believe it is the law—that intestacy is presumed and the children all inherit equally as heirs, then it is not material. It depends upon what view of the law your Honor may hold on the subject as to its materiality.

The COURT.—It may be received subject to defendant's objection. I really do not see at this stage of the case how it is material. It may become so at

(Testimony of Marcos C. de Baca.)

some time during the progress of the case.

Defendants Wise Exhibit 39.

The paper and its translation were received in evidence and marked by the clerk "Defendants Wise Exhibit 39," and is printed as part of the proceedings had subsequently on November 1, 1915. *Infra*, p.—)

Mr. FRANKLIN.—Q. Mr. Baca, you have already stated that Prudencio Baca, who was a son of Luis Maria Baca, died in 1882, have you not?

A. Yes, sir.

Q. Now prior to that time did Prudencio Baca make any statements to you in regard to the relationship of Antonio [305] Baca to Luis Maria Baca, deceased,

Mr. NOBLE.—I object to the question because it appeared yesterday that there was a controversy in 1875. This witness testified to it; and it also appeared from this document which has been put in evidence, that there was a controversy as far back as 1827 relating to the very question of the right to inherit, as this witness described it yesterday, of this alleged Antonio who is said to be, by the witness, the husband of this Francisca Garviso.

Objection overruled and exception allowed to plaintiffs.

Santa Cruz Development Company and Bouldins made the same objection, same ruling, and each then and there duly excepted to the ruling of the Court.

Mr. FRANKLIN.—Q. Now, prior to that time did Prudencio Baca make any statements to you in re-

(Testimony of Marcos C. de Baca.)

gard to the relationship of Antonio Baca to Luis Maria Baca, deceased? A. Yes.

Mr. FRANKLIN.—Q. When and as near as you can recollect, was your first conversation with Prudencio Baca on that subject?

A. I couldn't state it positive, but I think it was about 1873, the latter part of the year.

Q. And where was the conversation?

A. At Pena Blanca.

Q. New Mexico? A. Yes, sir.

Q. Please state what Prudencio Baca said to you in 1873 at Pena Blanca in regard to who Antonio Baca was and in regard to his relationship, if any, with Prudencio Baca himself or with Luis Maria Baca.

Mr. NOBLE.—Now, if the Court please, before that question is answered may I have the privilege of asking the witness some questions on the *voir dire*?

The COURT.—Yes.

Mr. NOBLE.—Q. You said yesterday, Mr. Baca, that along [306] back in 1875, I think it was you said, there was a controversy about some partition among the Baca heirs, did you not?

A. I believe that you misunderstood me, Mr. Noble, I said that in 18— if I am permitted to answer.

The COURT.—You may do so.

A. I said that I thought it was in 1875 that a partition suit was brought against the heirs of Luis Maria Baca for the partition of Baca Location No. 1

(Testimony of Marcos C. de Baca.)

in New Mexico, and for the partition of the Ojo del Espiritu land grant at that time.

Mr. NOBLE.—That was about in 1875?

A. Early in that year.

Q. There had been a controversy for a long period prior to the bringing of that suit among the Baca heirs as to who owned which part and how much they owned, etc.; hadn't there been?

A. Not to my knowledge.

Q. How old were you in 1873?

A. Sixteen years, a little over sixteen years.

Q. Where did you live? A. At Pena Blanca.

Q. And are you a son of Tomas Cabeza de Baca?

A. Yes, sir.

Q. Did you hear your family affairs discussed when you were a boy of sixteen?

A. Very often. My father told me everything about the family.

Q. And you knew that there was an effort on the part of various ones of the heirs to get their parts in the Baca Float No. 1, didn't you? A. No, sir.

Q. Didn't you know that they were claiming anything in Baca Float No. 1?

A. If you want me to state the facts about it, Mr. Noble—

Mr. NOBLE.—I would like you to answer my question.

The COURT.—Read the question. [307]

(Question read.)

A. The heirs of Luis Maria Baca, you mean?

Mr. NOBLE.—Q. Yes.

(Testimony of Marcos C. de Baca.)

A. Oh, of course, they were claiming.

Q. And they were claiming parts of this grant, this Ojo del— A. Ojo del Espiritu.

Q. And then you mentioned another tract of land that they were having a controversy about. What was the name of that one?

A. I don't know of any other one.

Q. These are the two you mentioned?

A. Those are the two that I mentioned at that time. What I mentioned about—

Q. Wait a minute. I just wanted to get the names. You said them in Spanish so quickly I thought there were three instead of two. Now, the controversy among the heirs of Luis Maria Cabeza de Baca is the controversy that you were talking about, isn't it?

Mr. FRANKLIN.—I object to that as assuming something that the witness did not say.

The COURT.—I will sustain the objection to that question because it assumes that there was a controversy.

To which ruling of the Court the plaintiffs then and there duly excepted.

Mr. NOBLE.—Q. Now, in 1875 and in 1874 and in 1873 you remember discussions, do you not, in your family and among the other members of the Baca family that you met as to how they were going to divide up this Grant No. 1, or this Ojo del Espiritu? A. No, sir.

Q. You don't remember any discussion?

A. No discussion was taking place at that time about the division of that land.

(Testimony of Marcos C. de Baca.)

Q. No discussion was taking place? A. No, sir.

Q. The discussion commenced suddenly in 1875, did it? A. Yes, sir. [308]

Q. Commenced suddenly?

A. I don't say it commenced suddenly. The partition suit was not brought.

Q. It commenced in 1875?

Mr. DUNSEATH.—May it please the Court, I object to these questions on behalf of the defendants Jesse Wise and Margaret Wise.

The COURT.—The objection is overruled.

To which ruling of the Court the defendants Jesse Wise and Margaret Wise then and there duly excepted.

Mr. NOBLE.—This discussion commenced in 1875. Did it commence the day the lawsuit began?

A. I couldn't say it commenced the day the lawsuit was brought. The lawsuit was brought by Jose Perea against the heirs of Luis Maria Cabeza de Baca.

Q. There was a controversy existing some time previous to the bringing of the lawsuit, wasn't there, a discussion and contention? A. Not that I knew.

Q. Not that you knew. Do you want the Court to understand that there was no claiming of rights on one side and claiming of rights on the other anterior to the date the suit was brought?

(Question read after some discussion.)

Mr. NOBLE.—I will change the word "anterior" to "before."

A. I don't mean that. I mean to say that if there

(Testimony of Marcos C. de Baca.)

was any discussion amongst themselves, it may have been which I did not hear it, and I was never informed about it.

Q. Now, you were a boy of sixteen in 1873, weren't you? A. Yes, sir.

Q. Where did Prudencio live at that time?

A. He had moved from Loma Parda to Pena Blanca.

Q. Where did your father live at that time?

A. Pena Blanca. [309]

Q. Where did Jesus live at that time?

A. Which one of the Jesuses?

Q. The first one.

A. Loma Parda in San Miguel County.

Q. Where did Jesus the Second live?

A. Same place.

Q. Where did the other sons and daughters of Luis Maria Baca whom you knew at that time live?

A. Manuel and Josefa lived at Pena Blanca at that time.

Q. Who is this Manuel? Was he a son of Luis Maria.

A. He was a son of Luis Maria.

Q. You saw them as a child, didn't you?

A. I saw them as a child and I saw Manuel when I was a grown man.

Q. We are talking about 1875 now.

Q. Did you ever hear any talk among these sons of Luis Maria Cabeza de Baca about their claims to this Float No. 1 prior to the fall of 1873?

A. I heard some claim about that Float No. 1 prior to 1873. [310]

(Testimony of Marcos C. de Baca.)

Q. You heard discussions of claims about that?

A. Yes.

Q. Now, about Ojo del Espiritu?

A. About Ojo del Espiritu I did not know anything until about 1873.

Q. Until about 1873? A. Yes.

Q. Now, the discussions were as to who owned these grants, were they not. About which ones of the sons of Luis Maria Baca were entitled to those grants, weren't they?

A. I did not hear any discussion, Mr. Noble. What I heard was speaking amongst the family about what they owned or what they did not own at that time.

Q. Would you say that there were no discussions among the family as to which one, which group was entitled to this right and which group was entitled to that right? A. Not in that manner.

Q. You would not say that? A. No, sir.

Q. As a matter of fact, you know, do you not, that for a long time there had been claims worked on by your father? A. I knew that.

Q. How early did you learn that?

A. Well, I couldn't say. Well, I can tell you that in 1869, in July, I went with my father for the first time to Baca Location No. 1.

Q. And you knew that your father was working on Baca Location as a claim for some of the Baca heirs?

A. Yes, sir; that is what he told me then.

Q. That is what he told you? Did you ever hear

(Testimony of Marcos C. de Baca.)

any disputes or any quarrels, or rumors of quarrels in the family about Baca Float No. 1? ,

A. No, sir.

Q. Never heard anything of that sort?

A. No, sir.

Q. You wouldn't say they did not exist?

A. I don't think so.

Q. Well, now, some of these Bacas in this lawsuit which [311] you referred to were claiming some rights as against somebody else, weren't they?

A. No, sir; I think that those rights were claimed by Don Jose Perea who claimed to have purchased the interest of these Bacas.

Q. Why did he sue the Bacas in that case?

A. Because according to the statute of New Mexico, they had a kind of partition law there and he brought suit to partition the property or sell it.

Q. In that case he had to prove who were the heirs of Luis Maria de Baca, didn't he? A. I think so.

Q. And they had a fight about who they were, didn't they? A. Yes, sir.

Q. That was the question in controversy, wasn't it—as to who the heirs of Don Luis Maria Cabeza de Baca were; that was the controversy; wasn't it?

A. Yes, sir.

Q. That suit was commenced in about 1875?

A. I think so; I am not positive about the date, Mr. Noble.

Q. You don't happen to know, because you were so young at that time how long anterior to that there had been any quarrel or any discussion or any con-

(Testimony of Marcos C. de Baca.)

tention between the parties?

A. I never heard any. I never heard any.

Q. You don't happen to know how long they had been discussing this question?

A. Amongst the family?

Q. Yes.

A. I don't think they had discussed it before that time.

Q. Why do you say that?

A. I will tell you why I say it.

Q. All right, let's have it.

A. Because my father always told me that he had been empowered by his uncle to get the Las Vegas grant confirmed, and that upon those terms he had employed Judge Watts at the time I think it was changed in Congress, he [312] had offered him a certain portion of the land if he could get that grant settled, and I understand—

Q. Now, then, Mr. Baca, I asked you why, but I direct your attention that what I asked you about was the controversy in the suit for partition. Now, that is what I want you to answer about. I don't mean to cut off your answer unduly, but what I am interested in is to find out the contention between the plaintiff and the heirs of Baca in the suit brought in 1875.

A. I cannot understand what it is that you want.

Q. You say that in this suit commenced in 1875 there was a man claimed to have bought out some interests from some of the heirs of Baca?

A. Yes, sir.

(Testimony of Marcos C. de Baca.)

Q. And he brought suit against some of the other heirs of Baca? A. Yes, sir.

Q. For partition, and in that suit they had to prove who the heirs of Luis Maria Cabeza de Baca were?

A. I have stated that.

Q. Now, I say to you, how long previous to 1875 had the plaintiff in that suit brought his rights which he there asserted?

A. I couldn't tell you how long prior to that. I know that he bought some interest in 1873.

Q. Did he buy any in 1870?

A. He may have bought; I couldn't say that. I never knew anything about the business. I knew about this transaction in 1873 because my father deeded to him some interest which he had purchased in Baca Location No. 1.

Q. And because he had purchased that interest and other interests he brought a suit involving the question of who the heirs of Luis Maria Baca were, and that, as you remember it, started in 1875?

A. I think so.

Mr. NOBLE.—Now, if the Court please, I think we have [313] shown from the witness that a controversy as to the heirs of Luis Maria Cabeza de Baca existed from somewhere along about 1873 down through the lawsuit. There were subsequent lawsuits which it isn't necessary here to go into; and that under the necessities of the situation which he described there was a controversy about this time, as to who the heirs of Luis Maria Baca were, because this suit was brought in 1875, only a short time after

(Testimony of Marcos C. de Baca.)

the conversation which he says he had with Prudencio Baca and about which he is interrogated.

Objection overruled; to which ruling plaintiffs and the defendant Santa Cruz Development Company and the defendants Bouldin then and there duly excepted.

Mr. FRANKLIN.—The question I asked was please state the conversation between Prudencio Baca and yourself in 1873 at Pena Blanca, in regard to the relationship of Antonio?

WITNESS.—I was inquiring from him who the children of Luis Maria Cabeza de Baca were. He gave me the names, amongst them the name of Antonio Baca, as the eldest child of Luis Maria. He gave me the name of another child who went by the name of Antonio, namely, Juan Antonio, who was my grandfather; he gave me the names of the rest of the heirs. I had a conversation with Prudencio Baca after 1873, and before I learned of this partition of 1875, on the subject of the relationship of Antonio Baca; this second conversation may have been in 1875; it was before the partition suit; I couldn't state exactly how long before; it may have been nearly a year; this conversation took place at my own father's house at Pena Blanca, New Mexico.

Mr. FRANKLIN.—Q. Now, will you please state the substance of that conversation so far as it related to Antonio Baca?

Mr. BREVILLIER.—We make the same objection. [314]

The COURT.—Same ruling.

(Testimony of Marcos C. de Baca.)

To which ruling of the Court the Santa Cruz Development Company, by its counsel, then and there duly excepted.

WITNESS.—I was showing Prudencio a list of the names of the family as I had got them, and was inquiring of him whether it was correct or not. In all the lists that I made I always had the name of Antonio Baca as the first son of Luis Maria Cabeza de Baca.

Mr. FRANKLIN.—Q. What did Prudencio say in regard to whether it was correct or not?

Mr. BREVILLIER.—Same objection.

The COURT.—Same ruling.

To which ruling of the Court Santa Cruz Development Company, by its counsel, then and there duly excepted.

WITNESS.—He said it was a correct list of Luis Maria Cabeza de Baca's family.

Q. Have you that list with you, that you made at that time?

A. I have a list with me made at that time, but it is a copy of the one that I made at that time. I have got several lists on scrap paper.

WITNESS.—The list that I made at that time I do not think that I have got it any more, but I have got copies which I made from that. I have got it with me. (Witness then produces paper.) I think I made this copy that I now show you—I couldn't say positive the year—but it might have been after 1880; I could not say how long after 1880, it must have been between 1880 and 1884. This, I say, is a

(Testimony of Marcos C. de Baca.)

copy of the list I then submitted to Prudencio Baca. It contains not only the names of the sons but the descendants of the sons, their wives and their children and grandchildren. [315]

WITNESS.—I want to state to you that in that list you will find that the family of Juan Antonio Cabeza de Baca was not inserted because I knew what the family were and he was my grandfather and I did not put it in there; Juan Antonio is not in that list. I had to put that in the book. I have it in the book where I have got all the family.

Q. You mentioned that there was an Antonio Lucero Baca, didn't you?

A. Antonio Lucero, no; Antonio Baca.

Q. Was his name Lucero? A. No.

Q. You mentioned Antonio Lucero Baca a little while ago. A. I don't think so.

Q. Yes you did, but you didn't mean Antonio Lucero if you said it.

The COURT.—I understood you to say Antonio Lucero.

Mr. HEATH.—At the head of the list.

WITNESS.—No.

Mr. FRANKLIN.—Q. If you did say Antonio Lucero you simply meant Antonio; is that the idea?

A. I meant to say that in all the lists which I made from the family record of Luis Maria Cabeza de Baca I had Antonio Baca at the head of every list as the eldest child of Luis Maria Cabeza de Baca.

Q. Did this Antonio have a further surname, Antonio Lucero Baca?

(Testimony of Marcos C. de Baca.)

A. No, he used to be called Jose Antonio sometimes.

WITNESS.—I stated that I had a conversation with Manuel Baca who was a son of Luis Maria Baca, in regard to Antonio. I did know a Manuel Baca who was a son of Luis Maria Baca. I have already stated that I had a conversation with him in regard to Antonio; Manuel Baca did not have any further name than Manuel. I couldn't fix the dates very positive when I had the first conversation with Manuel [316] Baca on the subject of Antonio. I had it at different times.

Mr. FRANKLIN.—Q. Did you have a conversation with him prior to 1875?

A. I do not recollect whether I had any with him or not prior to that time.

Q. Did you have a conversation with him after 1875? A. In 1875 I had a conversation with him.

Mr. NOBLE.—May we renew our objection.

Mr. FRANKLIN.—Q. Was that conversation with him before or after the bringing of the partition suit that you have referred to? A. Before.

Q. About how long before?

A. Well, I couldn't state how long before the suit was brought. I couldn't recollect at this time. It may have been six months; it may have been a year.

Q. Where did that conversation with Manuel Baca take place?

A. At my father's house at Pena Blanca.

Q. Now, please state the conversation that took place with Manuel Baca at that time in regard to Antonio Baca.

(Testimony of Marcos C. de Baca.)

Plaintiffs, defendant Santa Cruz Development Company and the Bouldins objected on the grounds heretofore made.

Objection overruled, to which ruling the plaintiffs, and the defendant Santa Cruz Development Company and the defendants Bouldin then and there objected.

WITNESS.—I was inquiring with him also if the list which I had made of the family of Luis Maria Baca was correct or not.

Q. What did he say?

A. And he said that was a correct [317] list of old Luis Maria Baca's children and that Antonio was the eldest child of Luis Maria Cabeza de Baca.

WITNESS.—Luis Maria Cabeza de Baca was married three times; he had three wives; I know the names, I have got them in that list, the first wife was Anna Maria Lopez, then Josefa Sanchez and Encarnacion Lucero; that accounts for some of these children being called Lucero. Manuel Baca is dead—he died, I am not positive but I think he died in 1905. I knew Domingo Baca who was a son of Luis Maria Baca; he is dead; I think he died about 1895. I couldn't say positive when I had my first conversation with Domingo Baca in regard to the relationship of Antonio Baca to Don Luis Maria Baca. It may have been in 1893 or 1894. It was at Pena Blanca.

Q. Please state what he said on the subject of Antonio Baca, the relationship of Antonio Baca to Don Luis Maria Baca?

(Testimony of Marcos C. de Baca.)

Plaintiffs, defendant, Santa Cruz Development Company and defendants Bouldin objected on the ground that it is clearly inadmissible and incompetent, since the conversation referred to took place twenty years after that controversy started.

Objection overruled. To which ruling of the Court, the plaintiffs, the defendant Santa Cruz Development Company and the defendants Bouldin then and there duly excepted.

(Question read.)

A. That he was a son of Luis Maria Baca.

The COURT.—I should like to ask the witness a question. I should like to know how you were interested in making these inquiries. What prompted you to make these inquiries on these various occasions?

A. I had a notion to make a book of the family record from Luis Maria de Baca to the present generation.

Q. You had that notion in 1873 and again twenty years [318] later.

A. I had that notion in 1873 when I left school.

Q. You took it up twenty years later?

A. Yes, sir; and I take it today when I find any member of the family that I haven't got in the book. I inquire from him who his children are and I put them down.

Q. Didn't you know twenty years after you got the first information from these other two heirs who the children were?

A. I had the information. I knew who they

(Testimony of Marcos C. de Baca.)

were by the list that I had.

Q. Were you representing them in a professional way at that time?

A. Not at that time. I never intended to practice any law.

Q. You did not?

A. And I did not for twenty years afterwards.

Q. Then you were't interested in the matter at all except—

A. No, sir; except to keep the record of the family; that is all.

The COURT.—Proceed.

WITNESS.—I was not acquainted myself with Francisca Garviso. I did make inquiry in regard to who she was from Prudencio Baca and Manuel Baca. In this list which I presented to Prudencio Baca the name of Francisca Garviso does appear. In the conversation which I had with Prudencio Baca he made statements to me as to whether Antonio was married during his lifetime. Francisca Garviso is dead. I don't know when she died. In the conversation with Prudencio Baca something was said in regard to whether or not Antonio Baca had any children.

Q. I am speaking now of the conversation of 1873, what did he say on that point?

Plaintiffs and defendants Bouldin objected on the ground that defendant Wise had not brought himself within the rule as to these children, and that this Prudencio Baca was himself [319] a party to a deed in 1871, prior to this, in which he cove-

(Testimony of Marcos C. de Baca.)

nants that the people who signed that deed are all of the heirs of Baca, and his declarations are inadmissible.

The COURT.—Can you estop a witness? [320]

Mr. CAMPBELL.—He is in the chain of title to Wise.

The COURT.—I understand, but is he estopped from swearing?

Objection overruled, to which ruling plaintiffs and defendants Bouldin then and there duly excepted.

WITNESS.—He said that Antonio Lucero Baca had a child.

Mr. FRANKLIN.—Q. Who was Antonio Lucero?

A. Antonio Baca, I mean, not Antonio Lucero.

Q. Then you are mistaken when you say Lucero?

A. Yes; I have another uncle by the name Antonio Lucero that I have got in another list.

Q. I am asking you the question whether Prudencio Baca said anything to you in 1873 as to whether or not Antonio Baca left any child or children?

A. Yes, he said he left a child.

WITNESS.—Nothing was said about when Antonio died?

Q. Do you know whether or not Antonio Baca was dead at that time? A. He was dead.

Q. Do you know that?

Mr. BREVILLIER.—One moment, if the witness has no personal knowledge as to whether or not the man was ever living,—depends entirely on what he hears,—certainly he has no personal knowledge as

(Testimony of Marcos C. de Baca.)

to whether he is dead.

The COURT.—I am surprised that the witness answered that question as he did. If he answers as a positive fact that he was dead when he does not know, it goes to his credibility. Of course, I will have to remember those sort of things when I come to consider the evidence.

A. I have been informed by Prudencio Baca and by my father that Antonio Baca was dead in 1873 and I believed everything that my father told me. Prudencio Baca stated to me the name of the son of Antonio Baca; his name was Juan [321] Manuel Baca. I did not know Juan Manuel Baca in his lifetime. I was told by Prudencio Baca and by my father and by Manuel Baca that Juan Manuel Baca was dead prior to 1873; they did not state when he died but he was dead in 1873; I was told that he was dead; I was told that Juan Manuel Baca was married and his wife was living at that time; Prudencio Baca told me that.

Mr. BREVILLIER.—As to the proof of marriage by the declaration of one person or two persons, I make the objection that marriage cannot be proved in that way and the testimony is incompetent, irrelevant and immaterial; and I move to strike out the testimony on the question of marriage.

Objection overruled, to which ruling of the Court the defendant Santa Cruz Development Company then and there duly excepted.

WITNESS.—Prudencio did state the name of the wife at that time. The name he gave me was Fe-

(Testimony of Marcos C. de Baca.)

Feliciana Padilla. I did not ever meet this lady, Feliciana. I don't remember her.

Mr. CAMPBELL.—If the Court please, I want to interpose another objection in a little different form. I don't think the Court quite understood the former objection, the one I attempted to make a moment ago. The objection is this: That the defendants Wise are estopped from showing that there was an heir other than those set forth in the deed of 1871. It appears from the testimony of this witness that his ancestor signed this deed wherein it was stipulated and covenanted that those signing the deed were the sole heirs of Luis Maria Baca. It appears also that the defendants Wise deraign their title through this man, this witness, and his ancestor covenanted to defend that title against all claims, he and his heirs. Whenever this heir acquired any title that was adverse to the title conveyed in 1871 he acquired it for the benefit of [322] the grantee of his ancestor under this warranty deed.

The COURT.—I think that objection was made early in the trial.

Mr. CAMPBELL.—I don't think it has been made. I attempted to make it a moment ago, but I don't think I made myself quite clear. It is not only the recitation that binds them. I made the objection that Mr. Wise, claiming title under this deed of 1871, was bound by it, but now it appears that they deraign title through this man, and that his ancestor warranted that he and his heirs and assigns would forever warrant the title conveyed by

(Testimony of Marcos C. de Baca.)
the deed of 1871.

The COURT.—This witness did not inherit the title. He purchased the title, did he not, to start with?

Mr. CAMPBELL.—It says that the said John S. Watts, his heirs and assigns, shall quietly enjoy the possession of said lands free from all claims or demands of said heirs of Luis Maria Baca, their heirs, administrators and assigns.

The COURT.—But that does not bind an heir who deraigns his title by purchase, does it?

Mr. CAMPBELL.—Why not? He has to make it good, if the Court please. If there is any outstanding title, it is his duty to make it good. His ancestor warranted the title and bound him to warrant his heirs to warrant the title.

The COURT.—I will hear you on that question in the argument. That is too deep a question to go into right now.

Mr. FRANKLIN.—Your Honor, I think if you will look at the deed you will find that question is not in the case.

The COURT.—I say that is a matter I will hear you on later. The testimony is received subject to the defendants' objection. [323]

Mr. NOBLE.—If the Court would allow me, I would like to participate in that objection and reservation.

The COURT.—Yes.

WITNESS.—I have made inquiry in regard to her as to where she is; she is dead. I have not

(Testimony of Marcos C. de Baca.)

learned the exact date when she died; I think she died about 1882. I know of my own knowledge that Juan Manuel Baca left two children surviving him; the names of the children that Juan Manuel Baca left are Jose Baca and Preciliana Baca. Jose was a son and Preciliana was a daughter. Preciliana afterwards married. She married Mares and her name thereafter was Preciliana Baca Mares.

I did know Jose Baca in his lifetime; he is dead; I think he died in 1905. He did leave children. I know his children. The names of the children of Jose Baca are Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca and Epigmenia Baca. Epigmenia Baca is dead and Inez Lucero is her daughter. I do not remember when Epigmenia Baca died, she was dead at the time that these various parties executed their deed to me. Now these various persons whose names I have mentioned as the children of Jose Baca are the same persons who signed the deed to me. There is another son of Jose Baca, Ignacio Baca, who is dead, but his children signed a deed to me for their interest. Ignacio Baca was a son of Jose Baca, in addition to the children whose names I have mentioned, I think he died in 1908 leaving children. The children that Ignacio Baca left were Guillerma and Eloisa. These two children are two of the persons whose names are signed to the deeds to me which are in evidence in this case. There were no other children of Jose Baca, deceased.

Preciliana Baca is dead; she was married in her

(Testimony of Marcos C. de Baca.)

lifetime to Antonio Mares; I knew him; she left children. I know all [324] the children she left. The names are Guadalupe Mares, Meliten Mares, Eulogio Mares, Entimo Mares, Higino Mares, Pabol Mares, Encarnacion Mares, Inez Mares, Felip Mares. Inez Mares, a son, is dead. He died about eighteen years ago; he left children.

Q. State the names of his children.

The COURT.—Why cannot you just say that they are all set out in the deeds.

Mr. FRANKLIN.—They are recited as being children in the deeds.

WITNESS.—Yes, sir.

Q. You are the same Marcos de Baca to whom they executed those deeds, are you not?

A. Yes, sir.

Q. And the same Marcos de Baca who executed the deed to Joseph E. Wise and Jesse Wise?

A. Yes, sir.

Defendants Wise Exhibit 33.

By consent of all parties a list of the children and descendants of Antonio Baca, and their descendants, made by the witness was received in evidence as a matter of convenience. Said list is as follows:

[325]

DEED NO. 19.

Widow of Jose Baca

Juana L. Baca

Preciliana Baca

Esteban Baca

Francisco Baca

Luciana Baca

Pilar Baca

Ines Lucero

Daughter of Epig-
menia Baca, dec'd.Son of Juan
Mannuel BacaSon of Antonio
Baca

DEED NO 20.

Guadalupe Mares de

Sandoval

Meliton Mares

Eulogio Mares

Eutimio Mares

Higinio Mares

Pablo Mares

Children of Precil-
iana Baca de MaresDaughter of
Juan Mannuel
BacaSon of Antonio
Baca

DEED NO 21.

Martina M. Baca

Widow of Ignacio
Baca

Guillermo Baca

Eloisa Baca

Children of Ignacio
Baca, dec'dSon of Jose
BacaSon of Juan
Mannuel BacaSon of Antonio
Baca

DEED NO. 23½.

Vidal N. de Mares

Widow of Ines Mares.

Vitalia Mares

Santiago Mares

Victor Mares

Adela Mares

Fermina Mares

Ramon Mares

Andres Mares

[\$26]

Son of Precil-
iana BacaDaughter of
Juan Mannuel
BacaSon of Antonio
Baca

(Testimony of Marcos C. de Baca.)

Mr. FRANKLIN.—Q. I believe you have stated that the various recitals as to these deeds, as contained in the deeds themselves, that were made to you about these various heirs, are correct?

A. Yes, sir.

Mr. BREVILLIER.—I would ask you, Mr. Franklin, to limit it to heirship subsequent to Antonio Baca.

Mr. FRANKLIN.—I will limit it that way, that the recitals of the family tree and descent, as contained in the deeds to you that are in evidence here, are correct.

Mr. NOBLE.—As to whom?

Mr. FRANKLIN.—As to all of these children he has been [327] testifying about The family tree is right in the deeds. I made this memorandum from those deeds, as being the descendants of Antonio Baca. Of course, as to the question whether Antonio was a son or not, he has already testified.

Mr. BREVILLIER.—And whether Antonio died leaving any children.

Mr. FRANKLIN.—That fact?

Mr. BREVILLIER.—Yes, beyond that fact.

Mr. FRANKLIN.—That is in accordance with what he has testified. The deeds are in accordance with what he has testified. The names are all in there as matters of record.

Mr. FRANKLIN.—Q. I will ask you to look at the deed which I now present to you, being Plaintiffs' Exhibit "G," and being the deed from Domingo Baca and Rosalia Garcia Baca to Franco

(Testimony of Marcos C. de Baca.)

Baca. I call your attention particularly to the description of the property that is described in that deed; there is a translation attached to that deed. I will read the translation for the benefit of the Court according to the translation, which is as follows:

“All that part to which the said Domingo Baca and Rosalia Garcia are, entitled under the location or lease of the Balle Grande, according to a judgment of the government of the United States in favor of the heirs of Luis Maria C. de Baca, which property is free of all classes of incumbrances and mortgage, we having a perfect right to dispose of the same.”

Now, Mr. Baca, do you know the lands called the Balle Grande, referred to in the deed?

A. Yes, sir.

Q. Where is the land known by the name of Balle Grande? A. It is Baca Location No. 1.

Q. Where is that situated?

A. In Sandoval County, New Mexico.

Q. And is that the name by which that Location No. 1 is generally known?

A. Amongst the native people, there, yes. [328]

Mr. NOBLE.—Q. Was that a part of the general boundary of 500,000 acres which your ancestor had known as the Las Vegas Grant? A. Yes, sir.

Cross-examination of the Witness, MARCOS C. de BACA.

(By Mr. KINGAN.)

I am familiar with the place known as Santa Cruz,

(Testimony of Marcos C. de Baca.)

mentioned in the will of Don Luis Maria Cabeza de Baca, and *referred in* the following clause in the will, namely, "I order that the rest of the lands known as mine be divided amongst my heirs in equal shares, except the place of Santa Cruz." That place—the place of Santa Cruz—is about three miles above the town of Pena Blanca on the north side; I should say, by taking the distance of the railroad, is 103 miles from Las Vegas. I began my genealogical study into the family of Baca in 1873; that is when I began. I was admitted to practice law in New Mexico, I was admitted in the District Court in 1889 and in the Supreme Court of the State in 1891. I was nine years old when I began to write in '66; [329] when I was sixteen years old I had quit school, I was then attending to my father's business; I did not have any business of my own; I was attending to his business—he was still living, that was Tomas Cabeza. I first met Mr. Joseph E. Wise in 1913. I did not have any correspondence with him prior to that time. I met him in Bernalillo. I had not at that time procured the conveyances which are in evidence here from the reputed descendants of Antonio Baca. I did not have any agreement with Mr. Wise to obtain this title from the heirs of the reputed Antonio. He did not ask me to give him the title for nothing during the time, and when I met him the first time he never spoke to me a word about those heirs. He just introduced himself to me as Mr. Wise. He was looking for me and asked if my name was Marcos de Baca and I told him that

(Testimony of Marcos C. de Baca.)

was my name; and he told me he would like to see me and I told him I was very busy that day in court, but told him I would be glad to have the pleasure of meeting him at any time he wished. So we set the hour of four o'clock in the afternoon to meet and I met him at four o'clock in my office. I did not at that time agree to get this title for Mr. Wise. Later I agreed to get it for him, and pursuant to the agreement with Mr. Wise I obtained these deeds that have been offered in evidence here from the reputed heirs of Antonio.

Q. Is it not a fact, Mr. Baca, that you are still interested in the matter to this extent; that if the heirship or title of Antonio is sustained you are to receive a certain amount of money?

A. It is not true, sir. It is a mistake, whoever may have informed you about it. [330]

WITNESS.—I did not represent to Mr. Wise at the time I sold him this property that those deeds carried title; I did not represent anything; I told him who the heirs of Luis Maria Cabeza de Baca were. A certain amount of money was not paid to me, it was paid to the heirs. I received the money which I paid for those interests. For my services of course I received something. I referred this morning in my testimony to a list, a so-called family tree, I have got it here (witness shows it to counsel). This is a list made out from the lists which were given to me; this is a list or a paper which is a copy of the lists made on different scrap copies; from those copies I have got this. I couldn't say positive

(Testimony of Marcos C. de Baca.)

when I made this list, but it was maybe in 1884 or maybe a little later, I couldn't fix the date positively, but it is within that date. I made the original of this paper from other papers made by me in my own handwriting. I wrote them down myself by the information of the other people—of the other heirs of Luis Maria Baca. It is not a fact that a large part of this list was copied by me from a statement of a geneological tree made by a lawyer. Prior to that time I did not see a list of those heirs. In 1875 I was in Pena Blanca, New Mexico. I don't know that lists were made at that time of the heirs. If they were I never knew. I never knew that Prudencio made a list. I don't know that Luis Maria Baca, the grandson of the old gentleman, made a list. I knew Luis Maria Baca personally; he did not know how to read or write. I heard of the Perea lawsuit of 1875. I don't know whether lists of the heirs were submitted at that time or not. I suppose that was a matter which involved the whole Baca family, I don't know whether it did or not. I have never seen the record in [331] that case even to to-day. I have known Mr. Clancy very well. I think that I have known him since he came to New Mexico in 1874 or '76. I have never talked with Mr. Clancy about these heirs; never mentioned them to him that I remember. I don't know whether he was one of the attorneys in the Perea suit or not. I don't know whether he made an exhaustive study of the Baca family or not. He never told me that he had. I don't know anything about Mr. Clancey's investiga-

(Testimony of Marcos C. de Baca.)

tions. If I ever have seen a list that Mr. Clancy made of the Baca heirs, I don't know whether he made it or somebody else; I don't know about that.

I had a conversation myself with Prudencio at the house of my father in 1873; at that time I was asking Prudencio who were the sons of Luis Maria Cabeza de Baca, because I wanted to know who they were. I didn't have any other interest or purpose in view. He gave me the names of the children; later on I presented a list to him, this list here; that was in 1875 and he said that the list was correct; that is what he told me. Now, my purpose in handing him the list at that time was to find out the correct list of the family of Luis Maria Cabeza de Baca for my own use. I did not have any other object. I could not say how old Prudencio was at that time; he was an old man; he may have been seventy-nine or he may have been eighty years; he was a very old man. Both my father and mother were alive in 1873. My father is the same Tomas who made the deed to John S. Watts of 1864. I don't know how much time before 1864 my father represented the Baca heirs. I think that up to 1873 and 1875 he was acting as agent for the heirs of Luis Maria Cabeza de Baca, prior to that time, that is, to 1873 and 1875. I think that he was conversant [332] at that time with the family affairs for say ten years preceding 1873 and 1874. My father died on March 9, 1875. I have never been informed as to whether or not the reputed Antonio, son of Luis Maria Baca, left a will; I don't know whether he left any or not.

(Testimony of Marcos C. de Baca.)

Cross-examination.

(By Mr. BREVILLIER.)

In 1873 and 1875 the surviving members of the family of Luis Maria Baca were not all poor people; there was part of them very poor and some others, those that I knew, were not very poor; they had enough means to live on. I don't know how many of that family could read and write; some of them could not, some of the adults; they were scattered about at that time in various parts of New Mexico; it was the same means of travel that everybody had at that time in New Mexico, at that time. I said that in 1873 of course I would believe everything that my father told me about the family; my father was a truthful man and I think there has never been any more honest man than he was to me; he was a man of business affairs and had business transactions and he had attained some honors in that community. He had held many political offices in the country where he lived at that time; he was looked upon as a big man, not only amongst Mexican people, but amongst the American people if you want to say so, because Judge Watts used to make my father's house his own home and Tomas Cabeza de Baca interested John S. Watts in securing the confirmation of the Las Vegas Grant, and I think furnished the information on which he acted. I don't know whether at that time my father was acting for the entire family or not; he was acting as agent for many of the children of Luis Maria Cabeza de Baca; in that [333] particular affair he was active.

(Testimony of Marcos C. de Baca.)

I heard about a gentleman by the name of Jose Francisco Salas. I don't remember that I knew the man; I have heard the name. I know the name of Ramigio Rivera, I don't remember the man.

(By the COURT.)

Q. When did you first hear that these heirs who claimed to be the heirs of Antonio Baca claimed any interest in the estate, or in this property?

A. I heard it since I can remember, in 1873.

Q. You heard it in 1873? A. Yes, sir.

Q. Did they ever institute any proceeding to recover any part of the estate.

A. I have not heard of any proceeding except what I read in regard to the petition, which I stated had been presented by this woman, Francisca Garviso, after the death of Luis Maria Cabeza de Baca.

Q. Had the Baca heirs disposed of all of the father's holdings in 1873? A. No, sir.

Q. Where was the property or the estate located?

A. It was located at that time—the most of the property was located in what was known as Santa Ana County, which became part of Bernalillo County in 1875.

Q. Did the heirs sell the property? A. Yes, sir.

Q. Was Antonio alive then?

A. No, he was dead, from what I have heard. My information is that Antonio died before his father, before Luis Maria.

Q. Antonio died before his father died?

A. Yes, sir.

Q. You are sure about that?

(Testimony of Marcos C. de Baca.)

A. That is what I have been told.

Q. By whom were you told that?

A. I was told by [334] Prudencio, and most of it by my father, and from what I have seen of the papers of my father at the time, he was dead before his father.

Q. How long prior to the death of his father?

A. It may have been a year or two. I don't know; I couldn't say about that. The petition that was presented to the Executive, or to the Governor, I don't recollect the exact date that the petition was presented, but it does not state when Antonio Baca died.

Q. Do you know of your own personal knowledge whether his children or heirs participated in the division of the property? A. I do not, sir.

Q. Did you ever make any investigation to ascertain? A. No, sir.

Q. Did you ever hear what the result of that partition, that controversy in that partition case was as to who were and who were not recognized by the Court as the heirs at law of Don Luis?

A. No, I did not know it. I did not, sir.

(By Mr. BREVILLIER.)

WITNESS.—I said that Antonio was also known as Jose Antonio. The name of my father was Tomas Cabeza de Baca; he was a man of business affairs and he could read and write; he was not a man of education; he signed his name sometimes "Tomas de Baca" and some other times he signed it "Francisco Tomas de Baca."

Testimony of Philip Contzen.

Philip Contzen was called as a witness on behalf of the defendants Joseph E. Wise, Lucia J. Wise, Margaret W. Wise and Jesse H. Wise, and having been duly sworn and examined *and* [335] testified as follows:

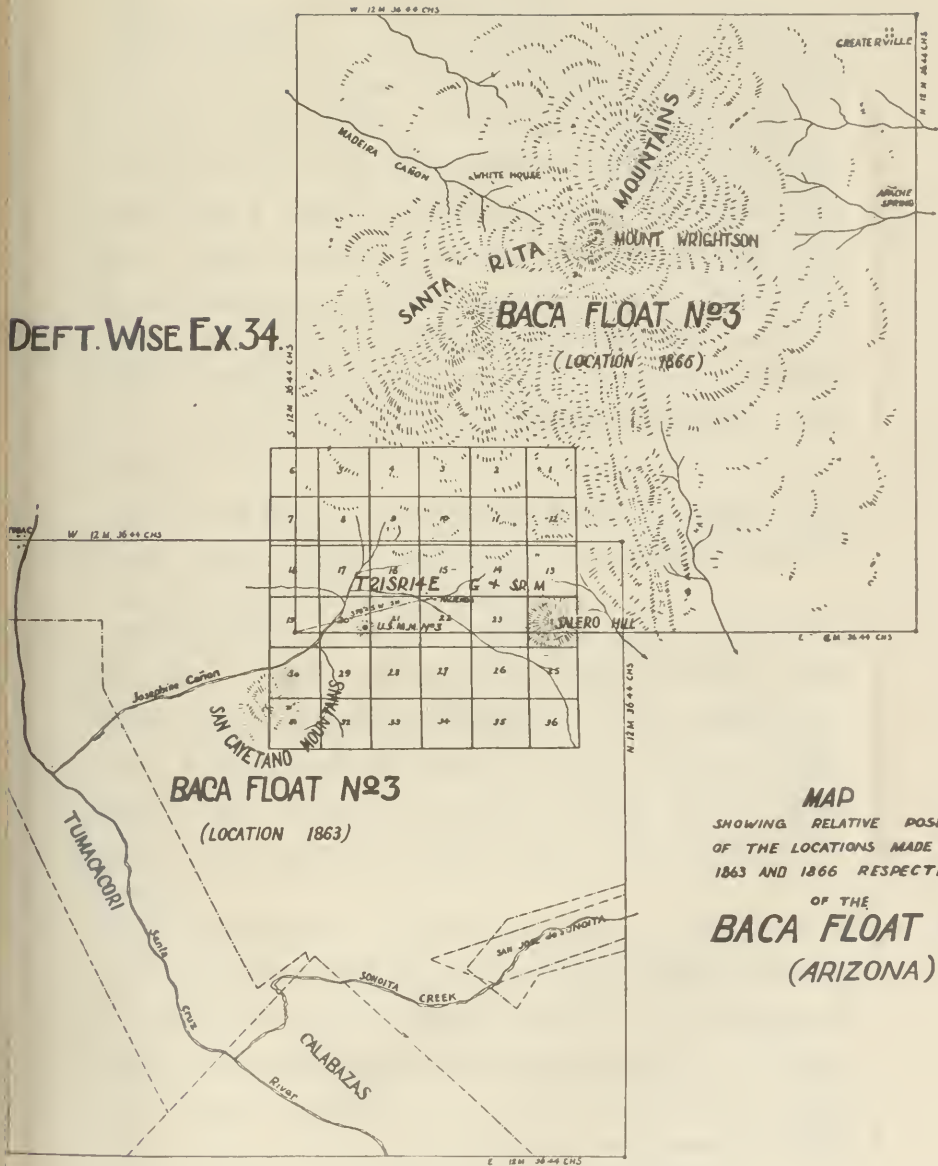
Direct Examination.

(By Mr. FRANKLIN.)

My name is Philip Contzen; age, 47; residence, Tucson, Arizona; profession, civil engineer and surveyor.

I am the same Philip Contzen who made the official survey of Baca Float No. 3 for the Government of the United States about 1905, and whose name is appended to a survey called the "Contzen Survey of Baca Float No. 3." I made a map from a certified copy of my own official survey and also from a certified copy of what is designated as the Roskruge survey of the '66 Location and did plat the same so as to show the relative position of the two different locations, and the map which you now show me is the map which I made; it shows the overlap correctly, according to those two maps.

DEFT. WISE EX. 34



BACA FLOAT No 3
(LOCATION 1863)

BACA FLOAT No 3
(LOCATION 1866)

MAP
SHOWING RELATIVE POSITIONS
OF THE LOCATIONS MADE IN—
1863 AND 1866 RESPECTIVELY
OF THE
BACA FLOAT No 3
(ARIZONA)

Defendants Wise Exhibit 34.

Defendants Wise offered in evidence said map, which accompanies this transcript.

WITNESS.—I am acquainted with the Salero Hill which is marked on my official map. I knew the Salero Hill before I made my official survey. I saw the ruins of the Hacienda de Santa Rita at the time when I made the official survey of Baca Float No. 3; they were there on the ground at that time. On my official map there are platted in the Tumacacari and Calabasas; those names are the names of certain land grants that existed at that time or before, along the Santa Cruz Valley—Mexican land grants.

Q. What kind of lands did these two grants take in, in regard to their being valley or mountain lands?

A. Principally valley lands.

WITNESS.—I knew a Mexican grant called the San Jose [337] de Soniota; this name San Jose de Sonoita is platted on this map of my official survey. I also made the official survey of the Sonoita grant. My survey of the Baca Float '63 Location takes in the Sonoita Creek which is shown there as Sonoita.

Mr. KINGAN.—Q. Mr. Contzen, on this part of your map about which you have just been testifying and which is marked Baca Float No. 3 Location of 1863, and the old land grant that you spoke of, Tumacacari and Calabasas, is it not a fact that a large part of those Mexican grants is composed of hills and spurs from the Santa Rita Mountains?

(Testimony of Philip Contzen.)

A. Yes, along the side lines of those grants, yes.

Q. Is it not a fact that a large part of the country included in what is known as the '63 Location is composed of spurs and ridges of the Santa Rita Mountains? A. Well, yes, yes.

Mr. FRANKLIN.—Taking the location that you surveyed, does that survey take in any of the mountains proper of the Santa Rita?

A. It takes a range known as "San Cayetano" range, which is probably a spur, a main spur of the Santa Rita Mountains, but it forms a range by itself.

Q. Are you acquainted with the range known as the Santa Rita Mountains? A. Yes, sir, I am.

Q. Now, the range known by that name, does that survey of 1863 take in the Santa Rita Mountains?

A. It does not, only portions of the south slope or, rather, the southwestern slope of the Santa Ritas near the Salero Hill.

Q. About how far down from the north line of the 1863 Location are these hills?

A. Well, about a few miles.

Q. How much? A. About two or three miles.

Q. But the mountains known as the Santa Ritas proper, [338] not the foothills of the mountains, but the mountains themselves, are they within the '63 Location as surveyed by you?

A. They are not.

Mr. KINGAN.—Q. Is it not a fact, Mr. Contzen, that the land from the main ridge of the Santa Rita east to Salero and beyond the Salero consists of the foothills of the Santa Rita Mountains? A. Yes.

(Testimony of Philip Contzen.)

Q. And is it generally known as a part of the Santa Rita Mountains in that district?

A. Well, it is considered as the foothills of the Santa Ritas.

Testimony of Joseph E. Wise.

Joseph E. Wise, one of the defendants, was called as a witness in his own behalf, and on behalf of the defendants Lucia J. Wise, Margaret W. Wise and Jesse H. Wise, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. FRANKLIN.)

My name is Joseph E. Wise, I am one of the defendants in this case. I live at Calabasas, Arizona, I am forty-eight years old. I am acquainted with a place called "Hacienda de Santa Rita," in Santa Cruz County. I have known the place called Hacienda de Santa Rita since March, 1884; I lived there first about April, 1884. I was then about seventeen. The name of my father is Morgan R. Wise. He was living there at that time, not permanently. He was there. My uncle, Solomon B. Wise, was living there more permanently. The Hacienda de Santa Rita consisted of some ruined buildings. There were some buildings that were fit for habitation when I started living there; they needed repairing. I lived in some of the old buildings. I lived at the Hacienda de Santa Rita until 1888, that is about four years. I was acquainted with [399] David W. Bouldin in his lifetime. I am acquainted with George J.

(Testimony of Joseph E. Wise.)

Roskruge. I was present at the Hacienda de Santa Rita when those two gentlemen came there, I think in April—or June in 1887, I heard Mr. Bouldin make statements at that time in my presence in regard to the Baca Float. At that particular visit, or immediately thereafter, Mr. Roskruge came first afoot with several men with his transit on his shoulder I remember, and the conversation with my father first was with Mr. Roskruge and later when Mr. Bouldin came up why he spoke with him. After that I saw Mr. Roskruge do something in regard to making a survey; he started to survey from the old Hacienda west, running west from the ranch and running a chain, chained the ground, going west and left there. But I did not follow him nor did I know exactly what his purpose was only through the conversations. Prior to that time I was familiar with the ground in the neighborhood of the Hacienda de Santa Rita; I was a cowboy out there, that was my vocation; that was my business. I would ride over the country a great deal. Shortly after that I did see monuments that had been recently erected. The monument that drew my attention was one about three miles west of the Hacienda de Santa Rita, on a ridge—a large pile of black malpais rock with a stake in it, or a post, and which I understood was the corner monument of Baca Float—I understood that afterwards. And then thereafter, I found a great many monuments in riding over the country and endeavored to know what they were for. I believed that they were the monuments that Mr. Roskruge had put up marking the

(Testimony of Joseph E. Wise.)

outboundaries of Baca Float as he had surveyed it. I am acquainted with a portion of the outboundaries of Baca Float No. 3, 1866 Location. I have seen the northwest corner monument and other monuments [340] in between the two, which would be the west line of the 1866 location and some of the monuments running east from the southwest corner or beginning line. That is all. The northwest monument is west of the Picacho rock in the Santa Rita mountains. This is a rock that protrudes very prominently on the west slope of the Santa Rita Mountains and sets out in the valley or mesas between that rock and the Santa Cruz River. That I found to be the northwest corner as surveyed by Mr. Roskruge. I have known the Hacienda de Santa Rita since 1884. I have been there many times. I have a ranch there.

The COURT.—I find that the Hacienda de Santa Rita is a well known place.

WITNESS.—I have occupied portions of the land on Baca Float, as I understood it, prior to 1907, when I purchased the interest from Mr. Wilbur King. At the present time I live at Calabasas on the Santa Cruz River, on the Baca Float. The place where I live is within the limits of the '63 Location of Baca Float. I have been living at that place, or near that place, since 1888.

Q. Now, I direct your attention to the following piece of land; the east half of the northwest quarter and the west half of the northeast quarter of section 35, township 22, range 13 east, Gila and Salt River Meridian, containing one hundred and sixty acres.

(Testimony of Joseph E. Wise.)

Are you familiar with that piece of land?

A. I am.

Q. Have you ever occupied that piece of land?

A. I have.

Mr. KINGAN.—We object to that as immaterial and irrelevant. That the plat of Baca Float No. 3 was filed under the mandate of the Supreme Court last December, 1914; at that time the land was segregated from the public domain; prior to that [341] time there could be no adverse possession; there could be no acquisition of title by prescription, or anything of that sort.

(Received subject to the objection of the plaintiffs.)

WITNESS.—I did fence up in 1889 the particular 160 acres just above referred to; I have been in possession of it since that time; prior thereto I filed on it and proved up on it. I filed in the Tucson land office and made my final proof to the Government so I thought I had title to it. I made my final proof on the filing of that land, about January, 1908. I made a homestead filing in the Land Office in Tucson and about 1908 I made final proof subject to patent whenever they would issue it. I claimed that 160 acres under my homestead filing; I claimed it adversely to everybody; I was cultivating it and using it from 1889 up to date.

Mr. KINGAN.—You claimed under and through the United States? A. I did, that 160 acres.

Mr. BREVILLIER.—In 1907 you took and secured deeds from various persons for an alleged par-

(Testimony of Joseph E. Wise.)

tial interest in the '63 Location of Baca Float No. 3?

A. I did.

WITNESS.—That was the first and only piece of land that I took up under the United States Land Office that is within the limits of Baca Float No. 3; that is under a homestead act; I don't think I ever did try to acquire title under any other law of the United States except that homestead; that is the 160 acres I am talking about.

I had patents for mines and millsites on this 1866 and the 1863 locations. I have a patent for a mill-site; the name of that millsite is the Magee Millsite; that patent covers the ruins of the Hacienda de Santa Rita, five acres; [342] that patent covers five acres and a few tenths. I have been in possession of that particular five acres since 1884; the millsite is enclosed and fenced; that fence has been there since 1890. I am the husband of codefendant Lucia J. Wise. I have been married since 1899.

Prior to that time I was acquainted with the mother of my wife, Mrs. Mary E. Sykes; I knew her.

Plaintiffs and defendants Bouldin admit that Lucia J. Wise if called would testify that Mrs. Mary E. Sykes in 1900 for a long time, but, anyway, in 1900 took possession of a forty-acre tract of land being the land described in paragraph 36 of the amended answer of defendants Joseph E. and Lucia J. Wise, as the land of Lucia Wise erected monuments and lived upon it, having a house, cultivating and using it and claiming it; made application for a homestead entry, which was rejected; but she lived there and

(Testimony of Joseph E. Wise.)

claimed it adversely from 1900 until the time of her death, which was about two years ago; and that her daughter Lucia J. Wise, one of the defendants, has taken possession for herself and as executrix of her mother's estate, lives upon the land and has claimed this particular forty acres ever since, the same being monumented on the corners and being cultivated and used by Mrs. Lucia J. Wise, and prior to that, by her mother, and since 1900.

Mr. FRANKLIN.—Q. She claimed this land—she made an effort to make a filing and the government refused, is that correct?

A. She did file, my wife had a filing because there was no one in the family on account of the father being in New York City when the land was opened. He was only upon it for one month, and she was the only one in the family that was capable of making a filing, so she filed, but when I came to prove up on my homestead she relinquished because husband and wife could not both take a homestead. Then the [343] mother also, who had occupied the land for thirty-five years, she made an effort to file and it was rejected on account of its being withdrawn after 1899.

Mr. FRANKLIN.—Q. After you obtained the deed that is in evidence from Wilbur H. King in 1907, what did you do in regard to taking possession of any part of the Baca Float, 1863, other than the homestead that we have been talking about and your wife's piece?

A. I took possession of a large part and fenced it up.

(Testimony of Joseph E. Wise.)

Q. How much of it did you fence up after you got the King deed?

A. Well, approximately about 8,000 acres.

Q. About how many miles of fence did you erect upon the Baca Float after you got this King deed, up to the date of the bringing of this suit?

A. Why, I think about 25,000 acres.

The COURT.—You mean the foreclosure proceeding under the judicial sale?

Mr. FRANKLIN.—No, your Honor. He got a deed from King.

The COURT.—I remember that you got a deed from King, but did that purport to convey the entire Float?

Mr. FRANKLIN.—No, it purported to convey the entire interest King had. We do not claim—we never did claim the entire Float.

The COURT.—Well, I say, so that interest was segregated, was it, or was it an undivided interest in the whole?

Mr. FRANKLIN.—An undivided interest in the whole.

The COURT.—How would he claim adversely to the other cotenants?

Mr. FRANKLIN.—He did not, but he claimed adversely to everybody else who was not his cotenant. It is for the purpose of notice to my friend, Mr. Bailey's, company if they should happen to claim as innocent purchaser for value without notice, [344] or something of the kind. We were in possession and claiming that property and fencing it up and us-

(Testimony of Joseph E. Wise.)

ing it from 1907.

The COURT.—Then your claim of possession only relates to the possession that you had without color of title?

Mr. FRANKLIN.—That is the only thing to which we lay any claim, under the statute of limitations, under adverse possession.

The COURT.—You abandon the other claims then?

Mr. FRANKLIN.—I have, in regard to his claim to it under a record deed, because he did not pay taxes on it all the time.

The COURT.—I just wanted to get clearly in my mind what you claim.

Mr. FRANKLIN.—My only object now is that kind of a possession which puts anybody upon notice who is claiming that there is any defect in that deed executed by Watts as attorney in fact for his brother and sisters. I do not know that you claim, Mr. Brevillier, to be an innocent purchaser without notice to your company.

Mr. BREVILLIER.—Without notice of what?

Mr. FRANKLIN.—Without notice of anything that was stated in the Watts deed to Bouldin.

Mr. BREVILLIER.—I know that the deed or instrument, whatever you wish to call it, of September, 1884, had been recorded and I had a full copy of it, and I believe the copy was made by Mr. Kingan.

Mr. FRANKLIN.—You had that before the Santa Cruz Development Company purchased whatever it got?

(Testimony of Joseph E. Wise.)

Mr. BREVILLIER.—Yes, sir; I had that and had an abstract with that paper in it.

Mr. FRANKLIN.—And at that time you were the attorney for the Santa Cruz Development Company, were you not, or, anyhow, an attorney of it? [345]

Mr. BREVILLIER.—The Santa Cruz Development Company was not formed until some time thereafter.

Mr. FRANKLIN.—But, anyhow, at the time the Santa Cruz Development Company did acquire its interest you were one of its directors and its attorney and charged with whatever you knew.

Mr. BREVILLIER.—Certainly.

Cross-examination.

(By Mr. KINGAN.)

Q. Prior to 1907 the first fences that you built outside of your 160 acres you built them upon what you believed was the public domain, isn't that a fact?

A. Why, I didn't but I built them and I took them down because the Government brought a suit against me and compelled me to take them down but I believed I had a right to fence them as long as there was a grant there.

Q. You yourself believed it was the public domain at that time, did you not? A. No, sir, I did not.

Q. Isn't it a fact that your only object in acquiring the King and Ireland title so called was to give you a color of title to fence up that float?

A. It is not.

(Testimony of Joseph E. Wise.)

Q. Isn't that a fact? A. It is not.

(Mr. BREVILLIER.)

Q. Mr. Wise, the forty acres you spoke of is a tract of land at Calabases Junction on which your present homestead is located?

A. That is Mary E. Syke's homestead.

Q. And you and your wife have lived there together since 1899? A. Yes.

Q. And since 1907 you have claimed an undivided interest [346] in Baca Float No. 3?

A. I have.

Mr. FRANKLIN.—The Government brought a suit in equity to enjoin him from fencing up, is my recollection, and I know that he took his fences down because he had to, and then he purchased the interest from Mr. Ireland and put fences up and notified the officials of the Government that he claimed an interest in the Baca Float.

The COURT.—But you do not claim any title by reason of possession under these deeds.

Mr. FRANKLIN.—No, your Honor.

Redirect Examination.

(By Mr. FRANKLIN.)

WITNESS.—The letter which you now hand me which is signed Alex F. Mathews, and is addressed to Dr. M. R. Wise; my father's name is M. R. Wise; this letter is dated Lewisburg, December 18, 1900. I first saw this letter about the time it was received by my father at Calabases and it has been in my possession since. The signature to said letter "Alex F.

Mathews" was the signature of said Alex F. Mathews.

Defendants Wise Exhibit 35.

Counsel for defendants Wise offered in evidence the letter of Alex F. Mathews to Dr. M. R. Wise, dated Lewisburg, W. Va., December 18, 1900.

The same was received in evidence over the objections of counsel for plaintiffs and defendants Bouldin, and was marked by the clerk "Defendants Wise Exhibit 35":

"Dear Sir:

Your letter of the 12th instant received. As you know the Dept. decided that Baca No. 3 was the location of 1863 and not that of 1866; that portions of [347] certain Mexican grants, Calabasas, Tumacacori be deducted from that location and none of the mineral lands passed and must now be segregated. Mr. Vroom representing or claiming under certain heirs of Jno. S. Watts is content with the location of 1863 but is fighting the above two conditions. And you are held to the location of 1863. I concur with him as to those two points and will that far join in his fight but I claim and expect the courts to decide that the true location is that of 1866. I claim under deed from Watts himself and I don't see how there can be any question as to my title for Watts having made deed to Hawley from whom my title comes there was nothing could go to his heirs for them to convey.

Yours truly,

ALEX F. MATHEWS."

Defendants Wise Exhibit 36.

Defendants Wise offered in evidence a certified photographic copy of petition by Alex F. Mathews to the Secretary of the Interior, filed on March 1, 1901, which reads in part as follows:

“IN THE DEPARTMENT OF THE INTERIOR.
BEFORE THE SECRETARY.

In re BACA FLOAT NO. 3.

To the Honorable, the Secretary of the Interior:

Your petitioner, Alexander F. Mathews, appealing to the supervising authority vested in the Secretary of the Interior to review, rehear and correct prior decisions of himself and his predecessors, where it appears that error has been committed, respectfully represents that error has been committed in the decision of the Secretary of the Interior in re Baca Float No. 3, of July 25, 1899, in the particular hereinafter set forth.

The matter of Baca Float No. 3 has been before the Interior Department on several previous occasions. Its history has been recited in full in the decision above referred to. It is sufficient here to say that it is one of the five (5) tracts of land authorized to be selected and located by the heirs of Luis Maria Baca under the act of Congress of June, 21, 1866. (12 Stat. 71-72) within three years from that date. * * *

By communication of the Commissioner of the General Land Office, dated May 21, 1866, addressed to the Surveyor General at Santa Fe, New Mexico, reference was made to the previous instructions of

April 9, 1864, to the Surveyor General of Arizona for the survey of the grant under the original selection or location of 1863, and also to the amended application of April 30, 1866, and thereupon further directions were given for the execution of the [348] survey 'in accordance with the amended description of the beginning point which is described in Mr. Watts' application of the 30th of April last, provided by so doing the outboundaries of the ground thus surveyed will embrace vacant land not mineral.' On June 11, 1866, the Surveyor General executed receipt of this communication and on July 2, 1866, Watts was notified of the estimated cost of survey, but no survey was ever executed. From the 21st day of May, 1866, when the Commissioner of the General Land Office allowed the amended description, to the 25th of July, 1899, when the decision complained of was made, no one, within or without the Department ever appears to have questioned the validity of the allowance of the 'amended description.' And the Department itself, in the decision of Secretary Lamar of June 15, 1887, held that 'the claimant must be held to this selection and location' (as under 'amended description.') The land so described was understood to be Baca Float No. 3. No mineral or homestead entries were allowed by the Department upon it and though many applications were made for mineral patents within its exterior lines, they were never entertained. The land as described in the 'amended dscription' was considered by the Government as private land, and passed from grantee to grantee for large considera-

tions, as Baca Float No. 3, and there was no thought or question that any other portion of the earth was Baca Float No. 3, in law or in fact. The question as to the mineral character of the land was the one upon which it was usually brought before the Department, from the date of the allowance of the 'amended description' up to the 25th of July, 1899, and had reference solely to the land covered by the said 'amended description' and it was not until the decision in *Shaw v. Kellogg*, 170 U. S. 312, that this mineral question was disposed of.

Shortly anterior to May 6, 1899, your petitioner, being the owner of record of Baca Float No. 3, applied 'for the survey of said grant as selected or located in the Territory of Arizona formerly a part of the Territory of New Mexico.' As no question had ever been made of the legality of the allowance of said 'amended description,' and as your Department had previously expressly decided that it was bound by the location as described in said 'amended description,' your petitioner was not heard thereupon; and the decision of July 25, 1899, whereby the allowance of said 'amended description' was declared void and of no legal effect, was made, without your petitioner having an opportunity to present to the Commissioner of the General Land Office and before the Secretary of the Interior his reasons why said 'allowance was valid, legal and effective in law.' Prior to July 25, 1899, your petitioner sold said property taking notes for the consideration of the same, secured by mortgage thereupon, upon which notes default has been made, largely occasioned by

the decision of July 25, 1899, and your petitioner has only recently been in a position to protect his interest in the premises by this appeal to that 'supervisory authority' vested in the Secretary of the Interior for the correction of an error in his decision of July 25, 1899, which has occasioned great [349] damage to your petitioner and which he believes would not have occurred had he been given opportunity to present his reasons touching the validity in law of the allowance of said 'amended description' of said property by order of the Commissioner of the General Land Office of May 21, 1866. * * *

For thirty-three years the Department has never questioned the legality of the allowance of the 'amended description.' It has decided they were bound by it. It has permitted the grant claimants to believe and act upon the fact that it was valid, legal and binding on the Government. The entire record in the case has been many times under consideration and after thirty-three years acquiescence in the rights of the grant claimants to the land described in the 'amended description' the reasons should be strong indeed, to compel the Department to assume a position from which every grantor but the Government would have been estopped in law, and from which the Government is estopped in every moral, if not legal, sense.

Surely the facts must be so clear on their face as to leave no room for doubt and the law so plain as to leave no room for other constructions to justify the Government in taking from the grant claimants the land it has permitted them to buy without question,

and place them upon land which is claimed by others in large part, a portion being by those to whom the Government itself has given patents. If this indisputability of facts and law exists, it is most curious that in the numerous times the cause has been considered it has escaped the notice for thirty-seven years. * * *

The premises considered your petitioner would pray that the said decision of the Hon. the Secretary of the Interior rendered on July 25, 1899, be amended in so much as it held the selection of 1863 (June 17,) binding upon the grant claimants and that it shall be held that the grant claimants are entitled to claim under the amended description of April 30, 1866.

And your petitioner will ever pray, etc.

ALEX. F. MATHEWS.

COURAD H. SYME,

Attorney for Petitioner,

422 5th St., N. W. Washington, D. C."

Counsel for plaintiffs and defendants Bouldin objected to the introduction thereof on the ground that it has no possible purpose in this case and cannot affect the Bouldin heirs; said instrument was received in evidence and was marked by the clerk "Defendants Wise Exhibit 36."

The Court in further ruling upon the introduction in evidence of the said instrument marked "Defendants Wise Exhibit 36," said: [350]

I sustain the objection to it (said instrument) in that it does not impart notice to the plaintiffs; and admit it for the purpose of enabling the Court to de-

termine, if upon examination I find it sheds any light upon the subject of the question in dispute.

It was stipulated by counsel, so as to avoid the time of calling Col. Syme again that if he were called he would testify that the money with which he acquired his interest in the Baca Float was acquired by him during coverture with earnings of his own in which his wife had no interest; and the same thing in reference to Captain Mathews.

Defendants Wise Exhibit 37.

Counsel for defendants Margaret W. Wise and Jesse H. Wise offered in evidence a deed from Jesse H. Wise to his wife Margaret W. Wise, dated and acknowledged the 28th day of August, 1913. Said instrument was received in evidence and marked by the clerk "Defendants Wise Exhibit 37," and, omitting statement of parties, *habendum*, signatures and acknowledgment, reads as follows:

"have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Margaret W. Wise, her heirs and assigns, all my right, title, interest and claim, of, in and to all that certain premises described as follows, viz:

All that certain tract of land situate in Santa Cruz County, in the State of Arizona and bounded and described as follows, to wit: Commencing at a point one mile and a half from the Salero Mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six

chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles thirty-six chains and forty-four links, to the place of beginning. Containing ninety-nine thousand two hundred and eighty-nine and thirty-nine hundredths acres more or less.

Being the same tract of land known as Location No. 3 which was located under and by virtue of the sixth section of an act of Congress passed June 21st, 1860, by [351] the heirs of Luis Maria Cabez de Baca.

The said title having been acquired by the said Jesse H. Wise by deeds from various Baca heirs recently.

Defendants Wise Exhibit 38.

Defendants Wise offered in evidence exemplified copy of a deed dated and acknowledged November 19, 1892, recorded in Pima County, Arizona, December 27, 1892, between John C. Robinson and Powhatan W. Bouldin, and James E. Bouldin. The same was received in evidence without objection, and is in words and figures following, to wit. [352]

THIS INDENTURE, made this nineteenth day of November, A. D., 1892, between John C. Robinson of Binghamton, New York, party of the first part, and Powhattan W. Bouldin and James E. Bouldin, of Austin, Texas, parties of the second part,

WITNESSETH: That whereas, the parties of the first and second parts, by deeds exchanged between them, the said parties of the first and second parts, for the consideration therein specified, have granted

and conveyed, each to the other, their heirs and assigns (the party of the first part, by deed executed at Binghamton, New York, dated twenty-eighth day of June, A. D., 1892, and the parties of the second part by deed executed at Austin, Texas, dated twenty-second day of August, A. D., 1892), one undivided half interest in all their rights, titles, property, claims and demands whatsoever, from whatever source derived, and in whatever manner acquired, in and to a certain tract of land, situate lying and being in the Santa Rita mountains in the Territory of Arizona, containing one hundred thousand acres, be the same more or less; bounded and described as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita; running thence north, twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south twelve miles, thirty-six chains and forty-four links to the place of beginning. The said tract of land being known as Location Number three (3) of the Baca series; together with one undivided half interest in all and singular the tenements, hereditaments and appurtenances thereunto belonging; and also one undivided one-half interest of all the estate, right, title and interest, as well in law as in equity, of the said parties of the first and second part in and to the above-described premises, and of every part and parcel thereof, in whatever manner acquired by the said parties [353] And this indenture farther witnesseth, that in order to make a full, perfect and absolute partition of the

above-described premises, and in order that each of the said parties of the first and second part may hold their share under the above-recited deeds, in severalty, the said party of the first part does hereby grant, assign, release and confirm to the said parties of the second part, their heirs and assigns forever, one-half of the above-described premises, bounded and described as follows, viz: Beginning at a point six miles, eighteen chains and twenty-two links north of a point, three miles west by south from the building known as the Hacienda de Santa Rita, running thence North six miles, eighteen chains and twenty-two links; running thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains and twenty-two links; running thence west twelve miles, thirty-six chains and forty-four links to the place of beginning. The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location number three (3) of the Baca series, together with all and singular the tenements and appurtenances thereunto belonging; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the party of the first part, in and to the above-described premises and every part and parcel thereof, with all the appurtenances thereof. To have and to hold said claims and rights and all and singular the above-mentioned and described premises, unto the said parties of the second part, their heirs and assigns forever. In Witness Whereof, the said party of the first part has hereunto set his hand

and seal on the day and year first above written.

In the presence of

JNO. C. ROBINSON,
D. L. BROWNSON. [354]

**Evidence Introduced by Defendant Santa Cruz
Development Company.**

Santa Cruz Development Company Exhibit 1.

Santa Cruz Development Company offered in evidence a certified copy of petition of John S. Watts, attorney for "petitioners, the surviving heirs at law of one Luis Maria Cabeza de Baca," filed in 1857, to the Surveyor General of New Mexico, asking for the confirmation of the Las Vegas Grant, under the act of Congress of July 22, 1854.

Defendants Wise objected on the ground that it was incompetent, irrelevant and immaterial; that it in no way proves heirship and cannot throw any light upon the subject; that the statements were made by attorney—his petition or his complaint are not evidence against anybody except, perhaps, against himself.

Objection overruled, to which ruling of the Court defendants Wise then and there duly excepted. The paper was received in evidence and so far as material reads as follows:

"Territory of New Mexico,
County of Santa Fe.

To the Hon. Wm. Pelham, Surveyor General of the
Territory of New Mexico, under the act of Congress approved 22d June, A. D. 1854:

Your petitioners the surviving heirs at law of one Luis Cabeza de Baca, deceased, would respectfully

state that on the 16th day of January, 1821, the Provincial Deputation of the State of Durango granted to the ancestor of your petitioners, Luis Cabeza de Baca, a tract of land called 'Las Vegas Grandes.' . . . Your petitioners further state that it will appear by reference to said grant that it was made to the said Luis Maria Cabeza de Baca and his male children and vested [355] him and his male children with an absolute title to said lands. . . . Your petitioners further state that Luis Maria Cabeza de Baca has long since departed this life and the only male children of the said Luis Maria Cabeza de Baca now living are the following, to wit: Luis Baca, Prudencio Baca, Jesus Baca the 1st, Felipe Baca, Jesus Baca the 2d, Domingo Baca and Manuel Baca. Your petitioners further state that the following sons of Luis Maria Cabeza de Baca are dead, to wit: Juan Antonio Baca, Jose Baca, Jose Miguel Baca, Ramon Baca, and Mateo Baca, and at the time of their decease they left the following children and heirs at law them surviving, to wit: Juan Antonio Baca left him surviving the following children, Jesus Maria Baca, Francisco Tomas Baca, Incarnacion Baca, Jose Baca, Josefa Baca, Guadalupe Baca, Altagracie Baca, Nicholasa Baca, Tomas Baca & Trinidad Baca. Jose Baca left him surviving the following children: Antonio Baca, Felipe Baca, Jose Maria Baca, Francisco Baca, Fernando Baca & Polonio Baca. Jose Miguel Baca left him surviving the following children, to wit: Diego Baca, Quirina Baca, Rumaldo Baca, Guadalupe Baca, Paulina Baca & Martina Baca. Ramon Baca left

him surviving the following child, to wit: Ignacio Baca. Mateo Baca left him surviving the following children, to wit: Luis Baca, Alejandro Baca, Juan Dios Baca and Martin Baca. Your petitioners further state that the foregoing list contains all the surviving heirs of the said Luis Cabeza de Baca, deceased, known to your petitioners and they are all residents of the Territory of New Mexico." . . .

"All of which is respectfully submitted,

JNO. S. WATTS,
Atty for Petitioners."

Santa Cruz Development Company Exhibit 2.

Santa Cruz Development Company offered in evidence [356] a certified copy of the affidavits of Jose Francisco Salas, Manuel Antonio Baca, Remigio Revira, Joab Houghton and Jose Maria Montoya, taken before the surveyor general of New Mexico in the matter of Las Vegas Grant in connection with the preceding exhibit. Objected to by defendants Wise on the ground that it was immaterial.

Admitted subject to objection of defendants Wise, to which ruling the said defendants then and there duly excepted. Said instrument was marked by the clerk, "Defendant Santa Cruz Development Company's Exhibit 2," and so far as material, the Salas affidavit reads as follows: [357]

TOMAS CABEZA de BACA.

JOSE FRANCISCO SALAS sworn:

Question. Where do you reside, are you in any way related to the claimants, or have you any interest in the claim?

(Testimony of Marcos C. de Baca.)

Answer. I live at Pena Blanca; I am not related to any of the claimants, neither have I any interest in the claim.

Question. Did you know Luis Maria Cabeza during his lifetime? Answer. I did.

Question. When did he die?

Answer. I saw him die and was present when he was buried, but do not recollect exactly how long ago it was but think it has been twenty-five years ago more or less.

Question. When did he die?

Answer. He was killed by a soldier under the Mexican Government. I was informed that he was killed on account of having some contraband property in his possession belonging to an American which he refused to deliver up.

Question. Do you know Luis Baca, Prudencio Baca, Jesus Baca, Sr., Felipe Baca, Jesus Baca, Jr., Domingo Baca and Manuel Baca?

Answer. I know them all.

Question. Whose children are they?

Answer. They are sons of Don Luis Baca.

Question. Are these the only living sons of Luis Maria Cabeza de Baca? Answer. They are.

Question. Were you acquainted with Juan Antonio Baca, Jose Baca, Jose Miguel Baca, Ramon Baca and Mateo Baca?

Answer. I did know them; they are all dead. They were sons of Don Luis Baca.

Question. Did Juan Antonio Baca leave any children at [358] his death?

(Testimony of Marcos C. de Baca.)

Answer. He did; they were Jesus Maria Baca, Francisco Tomas Baca, Incarnacion Baca, Jose Baca, Josefa Baca, Guadalupe Baca, Altagracia Baca, Nicolas Baca, Tomas Baca and Trinidad Baca.

Question. Did Jose Baca leave any children at his death? Answer. He did not.

Question. Did Jose Miguel Baca leave any children at his death?

Answer. He did; they were Diego Baca, Quirino Baca, Rumaldo Baca, Guadalupe Baca, Pauline Baca and Martina Baca.

Question. Did Ramon Baca leave any children at his death?

Answer. He did; they are Ignacio and no other.

Question. Did Mateo Baca leave any children at his death?

Answer. He did; they are Luis Baca, Alejandro Baca, Juan de Dios Baca and Martin Baca.

Question. Whose children were Antonio Baca, Felipe Baca, Jose Maria Baca, Francisco Baca, Fernando Baca and Pelonia Baca?

Answer. They were the children of Jose Baca.

Question. Are the above-mentioned all the children and grandchildren of Luis Ma. Cabeza de Baca? Answer. They are.

Question. Do you know the place situated in this territory and known as the Las Vegas Grandes?

Answer. I do.

Question. Do you know of its having been in the possession of Don Luis Maria Cabeza de Baca and if so for how long?

(Testimony of Marcos C. de Baca.)

Answer. They were in his possession. I had cattle [359] there belonging to Don Antonio Baca for sixteen years; we were driven off and returned again when the Indians became quiet. Don Luis Maria resided there for the space of ten years.

Question. What improvements did he make upon the place?

Answer. He had a hut built at the Loma Montosa, where himself and the cattle remained for a greater portion of the time. I did not see any other improvements; I had charge of the sheep herd and sometimes would come to the hut, for the greater portion of the time I was in another direction with the sheep.

Question. When did you go there for the first time?

Answer. It must have been between the years 1822 and 1823.

Question. Was any other person in possession or had any other person made any improvements on the land when you went there, except Don Luis and his sons?

Answer. I saw no other person there or any other improvements made.

Question. What was the cause of the place being abandoned?

Answer. Because the Indians drove us off.

Question. What amount of stock was there when you were driven away?

Answer. I had 3,000 sheep. I do not know how much horned cattle were there. The men had cows

(Testimony of Marcos C. de Baca.)

there that they milked.

Question. Did they cultivate any of the land?

Answer. They did not.

Question. Were there any horses or mares kept there? Answer. They had a great many there.

Question. In what year were they driven away by the Indians? [360]

Answer. I do not remember in what year.

Question. Are not some of the heirs above-mentioned still under 21 years of age?

Answer. They are all over 21 years of age.

Question. How old is the youngest one of the heirs?

Answer. There are many of the grandchildren under age yet.

His

JOSE FRANCISCO X SALAS.

Mark

(Subscribed and sworn to.)

Santa Cruz Development Company Exhibit 3.

Santa Cruz Development Company introduced in evidence without objection a duly certified copy of a certificate of selection dated June 21st, 1863, by John S. Watts, attorney for the heirs of Luis Maria Cabeza de Baca, of Location No. (5) Five, Baca Series, located in New Mexico.

Santa Cruz Development Company Exhibit 4.

Santa Cruz Development Company offered in evidence without objection a properly exemplified copy of the decree of the Supreme Court of the District of Columbia, which was concededly affirmed by the

United States Supreme Court, the mandate of the United States Supreme Court being issued on or after November 22d, 1914. [361]

**Decree of the Supreme Court of the District of
Columbia.**

This decree without the caption reads as follows. the nature of the case requiring that it be printed in full:

“This cause came on to be heard at this term and was argued by counsel; and thereupon upon consideration thereof it is by the Court this 3d day of June, 1913: ORDERED, ADJUDGED AND DECREED, that the title to the land selected and located by the heirs of Luis Maria Cabeza de Baca, on June 17, 1863, under the grant made to them by the act of Congress of June 21, 1860, and known as Baca Float No. 3, passed out of the United States and vested in said heirs on April 9, 1864; and it is further ORDERED, ADJUDGED AND DECREED, that thereafter the Land Department of the United States ceased to have jurisdiction over said land, except for the purpose of surveying the outboundaries thereof, in order to segregate the same from the public lands of the United States; and it is further ORDERED, ADJUDGED AND DECREED, that the plaintiffs herein or some of them, have shown sufficient title in themselves to said land, to enable them to maintain this suit; and it is further ORDERED, ADJUDGED AND DECREED, that the defendants Franklin K. Lane, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, and each of them, and their successors

in office, and all persons claiming to act under the authority or control of either of them be, and they are hereby required forthwith to place on file as muniment of the title which passed to the heirs of said Baca aforesaid, and for future reference as required by law, the field notes and plat of survey, made by Philip Contzen, under contract No. 136, dated June 17, [362] 1905, for the purpose of defining the outboundaries of said land and segregating the same from the public lands of the United States. And it is further ORDERED, ADJUDGED AND DECREED that the defendants Franklin K. Lane, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office, and each of them, and their successors in office, and all persons claiming to act under the authority, direction or control of either of them, be and they hereby are enjoined from proceeding in any manner in the matter of the alleged homestead entry of Henry Ohm, Tucson, No. 3024, Feb. 2, 1899, or in the matter of any of the other entries set out in exhibit "A" to the answer herein, or in any other matter affecting said land, except to file the survey, as herein directed."

Santa Cruz Development Company Exhibit 5.

Defendant Santa Cruz Development Company next offered in evidence a proper deed dated October 26, 1899, from J. Howe Watts and others, heirs of John S. Watts, to John Watts for the 1863 location of Baca Float No. 3 by the correct metes and bounds; said deed being recorded in the office of the County Recorder of Santa Cruz County, on August 2, 1909.

Counsel for plaintiffs and for the defendants

Bouldin objected to the introduction in evidence of said instrument on the ground that the same was immaterial, irrelevant and incompetent, in that the ancestor of the purported grantors, John S. Watts, had conveyed all the title to Hawley in 1870, and therefore, there was nothing to convey.

The instrument was received in evidence subject to said objection. [363]

Santa Cruz Development Company Exhibit 6.

Santa Cruz Development Company offered in evidence a proper deed dated February 3, 1913, recorded June 18, 1913, from John Watts and wife to James W. Vroom for the 1863 location of Baca Float No. 3, by correct metes and bounds.

Plaintiffs and the defendants Bouldin objected, for the reasons hereinbefore stated. Received in evidence by the Court subject to said objections.

Santa Cruz Development Company Exhibit 7.

Santa Cruz Development Company then offered in evidence a proper deed dated June 11, 1913, recorded February 3, 1914, from James W. Vroom and wife to the Santa Cruz Development Company for the 1863 location of Baca Float No. 3, by correct metes and bounds.

Plaintiffs and defendants Bouldin interposed the same objection as heretofore set forth. Received in evidence subject to said objections.

It was conceded and stipulated in open court that prior to the date of the last-mentioned deed, to wit: prior to June 11, 1913, the Santa Cruz Development Company was duly incorporated under the laws of the State of Arizona, and that its articles of incor-

poration were duly filed and published according to the statute and that it was authorized to do business and was authorized to acquire and hold real estate.

Santa Cruz Development Company Exhibit 8.

Santa Cruz Development Company offered in evidence a certified copy of a deed from Alex F. Mathews and S. A. M. [364] Syme to the Arizona Copper Estate, dated and acknowledged August 3, 1899, recorded on August 12, 1899, conveying Baca Float No. 3.

Objected to by plaintiffs and defendants Bouldin on the ground that it is immaterial, incompetent and irrelevant.

For the ruling on this see ruling in Santa Cruz Development Company Exhibit 9.

Santa Cruz Development Company Exhibit 9.

Santa Cruz Development Company then offered in evidence an exemplified copy of a deed dated July 25, 1914, duly acknowledged, recorded August 10, 1914, from the Arizona Copper Estate to Abbie M. Fowler, purporting to convey to her Baca Float No. 3 by correct metes and bounds of the 1863 location, without any mention of liens and incumbrances.

Plaintiffs and defendants Bouldin objected on the ground that it is immaterial, irrelevant and incompetent and as a conveyance made after the beginning of this action which had nothing to do with this lawsuit, and that it purports to convey the entire float and they had only title to the south half.

The COURT.—I will change my ruling. I will

sustain the objection to this deed and the one just preceding.

Mr. BREVILLIER.—May I have an exception to your Honor's ruling and file the papers nevertheless?

The COURT.—No, you may offer the paper, but this is not the taking of oral testimony under Rule 46. In other words, if that deed is offered, we have got to go through the whole proceeding that we have already gone through in the other case. They will contend that there was a reconveyance of that title. [365] That is the very issue I have got to decide in that case, and I cannot see that it jeopardizes the right of the Santa Cruz Development Company in this case one particle.

Mr. BREVILLIER.—I will take an exception to that.

Santa Cruz Development Company Exhibit 10.

Santa Cruz Development Company then offered in evidence an original deed from Abbie M. Fowler to the Santa Cruz Development Company dated August 1, 1914, and duly acknowledged and recorded on March 29, 1915, conveying the 1863 location of Baca Float No. 3 by correct metes and bounds.

The COURT.—I sustain the objection to that on the same grounds.

Santa Cruz Development Company then and there duly excepted to the ruling of the Court.

Mr. BREVILLIER, Counsel for Santa Cruz Development Company then said:

If the Court please I ask leave to amend my answer *nunc pro tunc* in order to set this up, the title

acquired in the Copper Estate transaction, and I ask your Honor to hold your ruling in abeyance until after the decree in the Copper Estate case.

The COURT.—The motion is denied.

Mr. BREVILLIER.—And I except.

Santa Cruz Development Company Exhibit 11.

Santa Cruz Development Company offered in evidence as a declaration against the interests of the Bouldin defendants and of the defendant Joseph E. Wise, the latter (Exhibit 1 for identification) dated November 25, 1884, written by David W. Bouldin [366] to John Watts, and referred to in the deposition of John Watts, hereinbefore printed.

Objected to by defendants Wise and Bouldin as an attempt to vary, alter or modify the terms of a valid written instrument, and because the gentleman refused to submit that to the attorney for Joseph E. Wise at the time of the examination of John Watts when his deposition was taken, so there was no opportunity of examining John Watts in regard to it.

Objection sustained.

Mr. BREVILLIER.—I take an exception. May the extract I claim is pertinent be read in and taken under Rule 46? ..

The COURT.—Yes.

Said extract reads as follows:

“My being sick has very materially interfered with my business arrangements and has also been the cause of my not sending you the certified copy of our agreement. Had I thought it was very material, or that you thought so,

I should have taken pains to have it copied, certified and sent to you. I expected every day that I would be well enough in a day or two to return and deliver it to you in person. I hope this explanation will be entirely satisfactory, and though I enclose you the certified copy as you request in your letter, I hope to have the pleasure to see you sometime next week in Santa Fe." [367]

Santa Cruz Development Company Exhibit 14.

Santa Cruz Development Company offered in evidence a photographic copy of a map accompanying the letter from the Commissioner of the General Land Office, to Hon. Thomas F. Bayard, United States Senate, dated May 16, 1884, showing thereon the conflict between the 1863 and 1866 locations of Baca Float No. 3.

Santa Cruz Development Company Exhibit 13.

Santa Cruz Development Company then offered in evidence a certified copy of a plat of Baca Float No. 3 accompanying the report of Frank S. Ingalls, United States Surveyor General in 1905, showing the location of the 1866 location in the Santa Rita Mountains.

Santa Cruz Development Company Exhibit 15.

Santa Cruz Development Company introduced in evidence an extract from a book entitled "Adventures in the Apache Country, tour through Arizona and Sonora, "by J. Ross Brown, published in 1869 by Harper Brothers, New York, incorporating a statement from Chas. D. Poston that between 1856 and 1868, he had lived for a considerable time at

Tubac, within the 1863 location of Baca Float No. 3; had extensive mineral interests in the Santa Rita Mountains; had visited the Salero Mountain and the Hacienda de Santa Rita and also Gandara, the claimant and party in possession of the Tumacacari and Calabasas grant, which he said comprised the Santa Cruz valley land and grazing land contiguous thereto. [368]

Santa Cruz Development Company Exhibit 17.

Santa Cruz Development Company introduced in evidence an exemplified copy of a power of attorney, dated May 1, 1864, recorded in New Mexico in 1871, from the heirs of Luis Maria Cabeza de Baca to Tomas C. de Baca, an exemplified copy of which was recorded in Santa Cruz county on February 3rd, 1915, authorizing him to convey to John S. Watts the property in suit.

ARGUMENT.

By direction of the Court, argument was then had on the Hawley deed.

The COURT.—To enable me to interpret the language used in the conveyance, and especially in the conveyance from Watts to Hawley, I have considered the evidence and the circumstances under which the deed was executed and also the testimony introduced by the defendants showing the subsequent acts, conduct and declarations of the parties. The rule to be followed by a court of equity in construing a deed is that [369] the real intent of the parties must be gathered from the whole transaction, including the general as well as the particular description, which should be construed so as to

give effect to the whole and every part of the instrument.

There is no doubt in my mind about what was intended to be conveyed by Mr. Watts, nor is there any doubt in my mind as to what was actually conveyed by the deed of 1870. It is clear to my mind that it was intended to convey and did convey the Baca Float of 1863 as described in the conveyance from the Baca heirs to Watts on May 1st, 1864. I think that the language used indicates that the dominant idea in the mind of the grantor, Watts, when the deed was made was of Baca Float No. 3 of 1863, conveyed to Watts by the Baca heirs in 1864, and not of the particular lines or marks by which it might be described.

I think it cannot fairly be said that Watts, having obtained the deed from the Baca heirs on May 1st, 1864, which was executed by nearly all of the heirs in person and by certain of them, and by other persons purporting to act for certain of the heirs who did not sign, that Watts afterwards conceived the idea of having all of the heirs execute the deed of 1871 to him, and thereby convey title to him, for his, Watts', benefit, and not for the benefit of his grantee Hawley. I do not think that there is anything in the testimony to indicate that such was the purpose and intent of Watts at the time he obtained the deed of 1871.

I am likewise of the opinion that if it be admitted that certain of the Baca heirs did not properly execute the original deed to Watts, and thereby convey their respective interests therein, and that the

people who signed that ancient document weren't authorized on behalf of those who did not sign to execute it, that their subsequent ratification of such signatures and conveyance in [370] the deed of 1871 to Watts, and that the title thereby acquired by Watts inured to the benefit of Watts' grantee, Hawley. That expresses my idea as to the legal effect of the conveyance mentioned.

Mr. Joseph W. Bailey, counsel for the defendants Bouldin, then said:

"I am of the opinion that this settles the matter. I am thoroughly satisfied myself that the Court is right in its judgment or opinion just announced. I think an offer now to prove our title under the 1884 deed and an objection by the other side, sustained, would leave us in a position where our rights would be protected in the event of a reversal, and at the same time, save further time."

The attention of the Court was then called to the instrument of Sept. 30, 1884 (Defendant Wise Exhibit 17), received subject to the objections of the plaintiffs and the Santa Cruz Development Company. The Court now sustained the objections of the plaintiffs.

Exceptions were duly taken by all the Wise defendants, the Ireland heirs (the intervenors) and Santa Cruz Development Company.

Mr. WELDON M. BAILEY.—We except also out of an abundance of caution.

Thereupon Mr. Franklin, counsel for defendants Joseph E. Wise and Lucia J. Wise and for the de-

fendants, Margaret W. Wise and Jesse H. Wise, moved the Court to strike out each and all of the following exhibits of the plaintiffs on the ground that they do not describe the property in dispute, to wit: Plaintiffs' Exhibits "U," "V," "W," "X," "Y," "Z," "AA," "BB," "CC," "DD."

The Court denied said motion and thereupon the defendants by their counsel duly excepted to the ruling of the Court. [371]

Thereupon defendant Santa Cruz Development Company moved the Court to strike out and exclude from the evidence, Joseph E. Wise Exhibit 36, being the deed of date November 19, 1892, from Robinson to Bouldin, on the ground that it is incompetent, irrelevant and does not affect the property in this action. Mr. MacKay, on behalf of the heirs of Ireland, Intervenors, joined in said motion.

The said motion was denied by the Court on the ground that no objection was made at the time and it is too late now, to which ruling of the Court the said defendants mentioned then and there duly excepted. [372]

Evidence Introduced by Defendants Bouldin.

Defendants Bouldin Exhibit 1.

Defendants Bouldin offered in evidence an exemplified copy of the record of a deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated the 7th day of November, 1894, and recorded November 26, 1894. Santa Cruz Development Company and defendants Wise objected for the reason that it does not cover the property in controversy.

Objection overruled, to which ruling said defend-

ants then and there fully excepted.

The description in said instrument reads as follows: All my right, title, property, interest, claim or demand whatsoever, from whatever source derived and in whatever manner derived, my said interest being an undivided one-half interest in and to the north one-half of the tract of land known as Location No. 3 of the Baca series, situate, lying and being in the Santa Rita Mountains, in Pima County, Territory of Arizona, containing in said North one-half 50,000 acres of land, being more particularly described as follows, to wit:

Beginning at a point six miles, 18 chains and 22 links north of a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links; thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links, to the place of be-
follows: [374]

Defendants Bouldin Exhibit 2.

Defendants Bouldin offered in evidence a Certificate of Sale from Joseph B. Scott, Sheriff of Pima County, Arizona, to Lionel M. Jacobs, dated the 16th day of June, 1894, and an assignment of same to Dr. M. A. Taylor, dated December 4, 1894, and recorded December 5, 1894, said Certificate of Sale being as follows: [374.

I, Joseph B. Scott, Sheriff of the County of Pima, Territory of Arizona, do hereby certify that under and by virtue of an order of sale, issued out of the District Court of the First Judicial District of the

Territory of Arizona, in and for the County of Pima, in the action of Lionel M. Jacobs, plaintiff against Powhattan W. Bouldin, defendant, rendered under a judgment in said action rendered on the 6th day of May, 1894, by said District Court, and which said order of sale was duly issued and attested on the 22d day of May, 1894, and was to me, as such sheriff duly directed and delivered, and whereby I was commanded to sell the property hereinafter described, or so much thereof as may be necessary, according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to these sums of \$258.70, and \$30, costs, and interest thereon. I duly levied on, and on the 16th day of June, 1894, at 11 o'clock of said day at the court house door of the County Court House, in the City of Tucson, in said County of Pima, I duly sold at public auction according to law, and after due and legal notice, to Lionel M. Jacobs, who made the highest and best bid therefor, at such sale for the sum of three hundred and twenty-seven and 60/100 Dollars lawful money of the United States, which was the whole sum paid by him for the real estate in said order of sale, and herein described as follows, to wit: All of the following described real property situate in the County of Pima, Territory of Arizona and more particularly described as follows, to wit, Location number three (3) being one of the first tracts of land selected and located by virtue of and in accordance with an Act of Congress of the United States approved June 21, 1860, entitled an Act to confirm certain private land claims in New

Mexico," and found in Volume 12, page 72, of the United States Statutes at Large by the heirs of Don Luis Maria Cabeza de Baca, and said [375] number three (3) being described as follows, to wit: That certain tract of land situate in the Territory of Arizona, formerly Dona Ana County, New Mexico, and more particularly described as follows. Beginning at a point one mile and a half from the Salero mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point, West 12 miles, 36 chains and 44 links, thence south 12 miles, 36 chains and 44 links, thence east 12 miles, 36 chains and 44 links, thence north 12 miles, 36 chains and 44 links, to the place of beginning, and containing 99,289 $\frac{39}{100}$ acres more or less. And all the right, title and interest of the said defendant, Powhattan W. Bouldin had in the foregoing described real property on the 2d day of March, 1894. Also all the right, title and interest, claim and demand of the said defendant Powhatan W. Bouldin, in and to that certain tract of land situate in said County of Pima, Territory of Arizona, commonly known and called Baca Float No. 3 (Three) and containing 99,289 $\frac{39}{100}$ acres, more or less, said tract and parcel of land being more particularly described as follows, to wit: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, running thence east 12 miles, 36 chains and 44 links, running thence south 12 miles, 36 chains and 44 links, running thence west

12 miles, thirty-six chains and 44 links, to the place of beginning, as it existed on the 2d day of March, 1894. And I further certify that I received no directions whatsoever from the said judgment debtor, Powhattan W. Bouldin or from anybody representing him, designating the order in which said parcels of land should be sold, and that I therefore deeming it for the best interest of all parties concerned did sell all of said property in one parcel, and that the said sum of three hundred and twenty-seven and 60/100 dollars, [376] in lawful money of the United States was the highest bid made, and the whole price paid therefor, and that the same is subject to redemption in six months pursuant to the statute in such cases made and provided. Executed in duplicate. Given under my hand this 16th day of June, 1893.

JOSEPH B. SCOTT,

Sheriff of Pima County, Arizona Territory.

Tucson, Ariz., Dec. 4th, 1894.

In consideration of the sum of Three Hundred and Fifty Dollars to me in hand this day paid by M. A. Taylor of Travis County, Texas, the successor in interest of Powhattan W. Bouldin, above named, I herewith assign to said M. A. Taylor the within certificate of sale, and said Taylor as the successor of said Powhattan W. Bouldin, having this day redeemed the above-described property from the sale by the sheriff to me, as above set forth, and I having on this day executed to said M. A. Taylor a deed or certificate of redemption therefor.

Witness my hand this 4th day of December, 1894.

LIONEL M. JACOBS,
By BARRON M. JACOBS,
His Attorney in Fact.

Witness:

SELIM M. FRANKLIN.

Recorded in Book 5 Misc. Records, page 270, et seq. Dec. 5, 1894. [377]

Defendants Bouldin Exhibit 3.

Defendants Bouldin offered in evidence a deed from Lionel M. Jacobs to M. A. Taylor, dated the 4th day of December, 1894, and duly recorded on December 5, 1894, to which instrument the Santa Cruz Development Company and defendants Wise objected on the ground that the same does not cover the property in controversy. Said objection was overruled, to which ruling of the Court said defendants then and there duly excepted.

The description in said deed reads as follows:

“all my right, title and interest in and to the following described tract, lot or parcel of land known as Location No. 3 of the Baca Series situated, lying and being in the Santa Rita Mountains in the County of Pima and more particularly described as follows: Beginning at a point 6 miles, 18 chains and 22 links north of a point 3 miles west by south from the building [378] known as Hacienda de Santa Rita, running thence north 6 miles, 18 chains and 22 links, thence east 12 miles, 36 chains and 44 links, thence south 6 miles, 18 chains and 22 links, thence west 12 miles, 36 chains and 44 links to

the place of beginning and being the northern half of the tract known as Location No. 3 of the Baca series. Being same land conveyed to me by the Sheriff of Pima County, Arizona, on June 16, 1894, by sale under execution issued on judgment recovered by me against said P. W. Bouldin.”

Defendants Bouldin Exhibit 4.

Defendants Bouldin offered in evidence a deed from James T. Bouldin to M. A. Taylor, dated the 25th day of April, 1895, and acknowledged on the same day and recorded April 30, 1895. Santa Cruz Development Company and defendant Wise objected on the ground that the same does not cover the property in controversy. Said objection was overruled, to which ruling of the Court said defendants then and there duly excepted.

The description in said instrument reads as follows:

“an undivided one-half interest being all of my interest in and to the following described land formerly situated in Dona Ana County, in the Territory of New Mexico, but now situate, lying and being in the County of Pima, Territory of Arizona, to wit: Beginning at a point 6 miles, eighteen chains and twenty-two links north of a point three miles west by south from a building known as the Hacienda de Santa Rita; running thence north 6 miles, 18 chains and 22 links; running thence east 12 miles, 36 chains and 44 links; running thence south 6 miles, 18 chains and 22 links; running thence west 12 miles, 36

chains and 44 [379] links to the place of beginning. The said tract of land bounded and described in the sentence immediately preceding this is the north one-half of the tract known as Location Number 3 of the Baca series, and sometimes called Baca Float or Grant Number 3 and contains fifty thousand (\$50,000) acres more or less. It being my intention to grant and convey to said M. A. Taylor, his heirs and assigns forever, all my right, title, interest, claim and demand, of whatsoever kind and nature in and to an undivided one-half interest in the north one-half of Baca Float Number 3, from whatsoever source and in whatsoever manner derived, whether by, from or through heirs of Luis Maria Baca, John C. Robinson, the Government of the United States or otherwise.”

Defendants Bouldin Exhibit 5.

Defendants Bouldin offered in evidence a deed from M. A. Taylor to Daisy Belle Bouldin, dated the 28th day of November, 1896, acknowledged on the same day and recorded the 22d day of December, 1896. Defendant Santa Cruz Development Company and defendant Wise objected on the ground that the same does not cover the property in controversy. Said objection was overruled and said defendants then and there duly excepted.

The description in said deed reads as follows:

“all my right, title and interest and the right, title and interest of the said community estate in and to the Placer mining lands in the Santa Rita Mountains, in Pima County, Arizona, and

described as follows: Beginning at a point 6 miles, 18 chains and 22 links north of a point three miles west by south from the building known as the Hacienda de [380] Santa Rita, running thence north 6 miles, 18 chains and 22 links; thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links to the place of beginning, and being the northern half of the tract known as Location No. 3 of the Baca series, being the same land described in deed by P. W. Bouldin to me, dated November 7, 1894, and recorded in real estate records of said County, Book 26, pages 754 and 755; also described in deed of James E. Bouldin to me dated April 25, 1895, and recorded in deed records of real estate in said County, in Book 27, pages 75 and 86; also described in original certificate of sheriff's sale, by Joseph B. Scott, sheriff of Pima County, Arizona, dated June 16th, 1894, and recorded in Miscellaneous Records of said county, in Book 5, pages 270 et seq.; also described in deed of L. M. Jacobs to me dated December 4th, 1894, and recorded in real estate records of said county, in Book 26, pages 765 et seq. to all of which reference is here made for further description."

Defendants Bouldin Exhibit 6.

Defendants Bouldin then offered in evidence a deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracey dated the 16th day of April, 1900, acknowledged on the same day and recorded

on June 26, 1907. Santa Cruz Development Company and defendants Wise objected to the introduction of said paper on the ground that the same does not cover the property in controversy. Said objection was overruled, to which ruling of the Court said defendants then and there duly excepted. [381]

The description in said deed reads as follows:

“An undivided one-half interest in all that piece, parcel or tract of land described as follows: Beginning at a point 6 miles, 18 chains and 22 links north of a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north 6 miles 18 chains and 22 links; thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; thence west twelve miles, 36 chains and 44 links to the place of beginning and being the northern half of the tract known as location No. 3 of the Baca series being the same land described in deed by P. W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894, recorded in Real Estate Records of said county, (Pima, Arizona) Book 26, pages 754 and 755— Also described in deed of James E. Bouldin to Dr. M. A. Taylor dated April 25, 1895, and recorded in deed records of real estate in the County aforesaid, in Book 27, pages 75 and 76, also described in original certificate of Sheriff’s sale by Joseph B. Scott, Sheriff of Pima County, Arizona, dated June 16, 1894, and recorded in Miscellaneous Records of said County in Book 5, pages 270 et seq. also described in deed of

M. L. Jacobs dated December 4, 1894, and recorded in Real Estate Records of said County (Pima) in Book 26, page 765 et seq., to all of which reference is here made for further particulars.’’

Defendants Bouldin Exhibit 7.

Defendants Bouldin then offered in evidence a deed from D. B. Gracey to James E. Bouldin, dated the 15th day of June, 1907, acknowledged on the same day and recorded on June 26th, 1907. Santa Cruz Development Company and defendant Wise objected on the ground that it does not cover the property in question. Said objection was overruled by the Court to which [382] ruling of the Court said defendants then and there duly excepted.

The description in said deed reads as follows:

“all that certain undivided one-half interest in and to all that piece, parcel or tract of land described as follows, to wit, in Pima County, Arizona, in Santa Rita Mountains beginning at a point 6 miles, 18 chains and 22 links north of a point three miles west by south from the building known as the Hacienda de Santa Rita; running thence north 6 miles, 18 chains and 22 links; thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links to the place of beginning and being the northern half of the tract known as Location No. 3 of the Baca series being the same land described in deed by P. W. Bouldin to Dr. M. A. Taylor dated Nov. 7, 1894,—and described in real

estate records of said County (Pima), Arizona, Book 26, pages 754 and 755; also described in deed of James E. Bouldin to Dr. M. A. Taylor dated April 25, 1895, and recorded in real estate records of deed of real estate in the county aforesaid in Book 27, pages 75 and 76, also described in Original Certificates of Sheriff's sale by Joseph B. Scott, Sheriff of Pima County, Arizona, dated June 16, 1894, and recorded in Miscellaneous Records of said County, in Book 5, pages 270 et seq.; also described in deed of M. L. Jacobs to Dr. M. A. Taylor, dated Dec. 4, 1894, and recorded in Real Estate Records of said Pima County in Book 26, pages 765 et seq, to all of which reference is here made for further particulars." [383]

Defendants Bouldin Exhibit 8.

Defendants Bouldin offered in evidence a deed dated and acknowledged the 24th day of June, 1913, and recorded July 7, 1913, by James E. Bouldin to Jennie N. Bouldin, purporting to convey the undivided one-half of the north one-half of Baca Float No. 3 by the metes and bounds of the Location of 1863.

Mr. WELDON M. BAILEY.—Mr. Brevillier, you and the plaintiffs stipulated that whatever interest went from John C. Robinson to P. W. and James E. Bouldin in 1892 is now vested one-half in Jennie N. and one-half in the heirs of Daisy Belle Bouldin.

Mr. FRANKLIN.—Your Honor, I wish the record to show that the defendant Joseph E. Wise did

not make any such stipulation. I did not sign any such stipulation.

The COURT.—Very well, the record will show that.

Mr. WELDON M. BAILEY.—We rest. [384]

Plaintiffs' Exhibit "FF."

Plaintiffs then offered in evidence a power of attorney from James E. Bouldin, Jr., to David W. Bouldin, dated November 11, 1891, and recorded at the request of D. W. Bouldin, August 24, 1892, authorizing said David W. Bouldin to convey or do anything that he deems proper with reference to the interest of James E. Bouldin in Baca Float No. 3.

Plaintiffs' Exhibit "GG."

Plaintiffs offered in evidence power of attorney from Powhatan W. Bouldin and Lucy Bouldin, his wife, to D. W. Bouldin, dated October 3, 1890, and recorded at the request of D. W. Bouldin August 24, 1892, to the same purport as Plaintiffs' Exhibit "F."

Thereupon plaintiffs moved the Court to strike out Mr. Joseph E. Wise testimony as to possession and adverse possession.

Mr. FRANKLIN.—I object to the motion to strike on the ground that we consider the evidence relevant to the question of adverse possession.

Mr. NOBLE.—The motion is based, of course, upon the ground that his claim of adverse possession cannot be maintained here, because this land in question was not segregated from the public domain until between December 2, 1914, and December 14, 1914. Therefore there could be no possession or adverse

possession; it being a part of the public domain up to that time.

The COURT.—I sustain the objection to that testimony and order the evidence as to possession of Mr. Wise stricken out. [385]

To this ruling of the Court counsel for Joseph E. Wise and Lucia J. Wise then and there duly excepted, and asked that the testimony be considered as taken under the Equity Rule 46.

The COURT.—It may be so considered.

Thereupon counsel for plaintiffs moved the Court for a decree *pro confesso* against W. G. Rifenburg, and asked the Court to take notice of proof of service by publication upon him as filed in the clerk's office. The Court then ordered that such decree *pro confesso* be taken against the defendant W. G. Rifenburg.

Counsel for defendants Bouldin and counsel for Santa Cruz Development Company and counsel for defendants Wise joined in the request for the order for a judgment by default against said Rifenburg, and their several requests were allowed.

Minute Entry of April 1, 1915.

All parties being in court and having rested the following minute entry was made by the Court: "By agreement of all parties hereto, it is ordered that the defendants Joseph E. Wise and Lucia J. Wise shall have twenty days from this date within which to file herein their brief upon the question as to whether Antonio Baca is one of the children and heirs of Luis Maria Cabeza de Baca, and that the plaintiffs and other defendants herein may have twenty days

from the expiration of the time given to the defendants Joseph E. Wise and Lucia J. Wise within which to file their briefs in reply thereto, and that the case be taken under advisement by this Court.

Subsequent Proceedings.

Thereafter and on the 12th day of August, 1915, the defendants Joseph E. Wise and Lucia J. Wise filed a motion in writing to set aside the order of submission of April 1, 1915, and for [386] an order permitting them to file as additional evidence in the case, and to be deemed and considered as evidence, said motion being as follows:

Motion to File [Additional Evidence].

Now come defendants Joseph E. Wise and Lucia J. Wise, and move the Court for an order permitting them to file, as additional evidence in this case, and to be deemed and considered as evidence in the record of this case, the following documentary evidence, to wit:

(1) Certified copy of affidavit signed and sworn to by Prudencio C. de Baca, on November 10, 1879, filed in the District Court of the Second Judicial District of the Territory of New Mexico, in and for Bernallilo County, in the case of Jose L. Perea et al., vs. Louis Sulzbacher et al., and being a record of said court in said case; which said affidavit sets forth the names of all the children and descendants of Luis Maria Baca, and shows that Antonio Baca, also called Jose Antonio Baca, was a son of Luis Maria Baca; that said Antonio died, leaving one legitimate child, to wit, Juan Manuel Baca, that he died leaving two children, to wit, Jose Baca and Preciliana, who mar-

ried Antonio Mares.

(2) Certified copy of an affidavit signed and sworn to by Luis A. C. de Baca, on October 12, 1887, filed in the said District Court of New Mexico aforesaid, in the said case of Perea et al., vs. Sulzbacher et al.; and being also a record of said court in said case, which said affidavit also sets forth that said Antonio Baca was a son of Luis Maria Baca, which son left a son Juan Manuel, who dying left two children, to wit, Jose Baca and Preciliana, wife of Antonio Mares. [387]

And the said defendants aforesaid, further move the Court to set aside the order heretofore made, submitting said case, to the end that said case be reopened so that said two certified copies of affidavits aforesaid, may be offered in evidence by these defendants, and may be introduced and filed by them as evidence in this case, and for such other and further orders as may be necessary in the premises.

The said documentary evidence which said defendants herewith ask leave to file as evidence in said case, to wit, the said certified copy of the affidavit of Prudencio C. de Baca and of Luis A. C. de Baca, are herewith deposited with the clerk of this court for inspection of Court and counsel.

JOSEPH E. WISE and
LUCIA J. WISE,
By SELIM M. FRANKLIN,
Their Solicitor.

Filed August 12, A. D. 1915.

Proceedings of September 30, 1915.

Thereafter and on the 30th day of September, 1915,

the said motion came up for hearing before the Court, all the attorneys for all the parties to this action, except W. G. Rifenburg, whose default had theretofore been taken and entered, being present in court.

Counsel for Joseph E. Wise argued and submitted said motion and thereupon the Court denied said motion, to which ruling of the Court the defendants Joseph E. Wise and Lucia J. Wise, Jesse H. Wise and Margaret W. Wise, then and there duly excepted.

And on said day in open court and in the proceedings in said case, counsel for said Joseph E. Wise said: [388]

Now, your Honor, during the trial of the case Joseph E. Wise objected to the introduction in evidence of a deed; being the deed of May 1st, 1864, from certain Baca heirs to John S. Watts, being Plaintiffs' Exhibit "C." We objected to that deed on the ground that as to certain ones of the heirs of Baca it was not their deed, either that they had not signed it or for other reasons set forth at that time, and the record shows the ruling of the Court was—the instrument was received in evidence subject to the objections of the defendants Joseph E. Wise and Lucia J. Wise. Your Honor has never ruled upon that objection.

The COURT.—The objection will be overruled.

To which ruling of the Court defendants Joseph E. Wise, Lucia J. Wise and all the intervenors, by their counsel, and defendants Santa Cruz Development Company by its counsel, then and there duly excepted.

Thereupon the Court said to the attorneys for the other parties to said action then in court:

The COURT.—Do you gentlemen desire to raise any question at this time?

Mr. CAMPBELL, Counsel for the Bouldins.—If your Honor please, there was offered in evidence by Mr. Franklin on behalf of Joseph E. Wise and Lucia J. Wise a judgment-roll and certain court proceedings, a certified copy, I mean, which we objected to, and your Honor said that you would hear us on our objections in the argument. Then if I remember correctly there was a motion made to strike out, which was not ruled on by your Honor. Now those could only be material in the case in the event that the '64 and '71 deeds did not carry any title to Watts. Your Honor held that they did, and thereafter, you will remember, Mr. Franklin put in his whole case. But I should like to have the [389] record clear on that, that they are rejected because they would be entirely immaterial. The record stands this way, if the Court please: Mr. Franklin put in his case at his request prior to the time that your Honor gave close consideration to the conveyances of '64 and '71, so that he had offered this judgment and the foreclosure proceedings and the sale—all of the proceedings. We objected to it at that time upon many grounds, of defects in the proceedings leading up to the sale, and in the sale itself. Then after your Honor had ruled we moved that the entire matter be stricken from the record. Your Honor had never yet admitted them in evidence. You simply said we could make our formal objections and you would hear us in our argument.

Thereupon the Court sustained the objection of counsel for the defendants Bouldin to the introduction in evidence of the said judgment-roll and court proceedings (being Defendants Wise Exhibit 19). To which ruling of the Court the defendants Joseph E. Wise, Lucia J. Wise, Jesse H. Wise, Margaret W. Wise and the Intervenors, by their counsel, then and there duly excepted.

The COURT.—Are there any other objections to be ruled on?

Mr. KINGAN.—I want to call the Court's attention to an objection made to the admission in evidence of the will of Luis Maria Cabeza de Baca. When that paper was offered in evidence it was objected to by Mr. Brevillier as being avowedly a copy of a copy and not certified. To his objection your Honor said he would receive it subject to the objection, and for further consideration as I remember. The point, therefore, has never been ruled upon. At this time, therefore, at the instance of Mr. Bernard who represents the Santa Cruz Development Company, [390] we ask your Honor to rule on the objection made to the introduction in evidence of the so-called will.

Mr. FRANKLIN.—Now, I want to say this, your Honor. They never objected to this simply on the ground that, being a copy, it was not the best evidence.

Mr. KINGAN.—We said it was incompetent.

Mr. FRANKLIN.—Incompetent, but not on that ground. They specify no ground except it was incompetent, irrelevant and immaterial. It was

allowed to go in subject to their objection, and the Court said it did not see how it was immaterial; intimating that if it was material it would be sufficient.

The COURT.—I remember ruling—stating at that time or during the trial sometime, that either party would be permitted within a reasonable time to obtain certified copies of any instrument which was not certified to for the purpose of being offered in evidence.

The COURT.—I will permit you to obtain a certified copy. Under the facts in this case and under the statement that I made it seems to me that it would be right and proper to permit you to obtain and file a certified copy for the reason that I stated that that would be allowed either counsel in the case, either party.

The Court then said: I cannot understand how I happened to admit that, even subject to the objection; being a copy of a copy, and having been made by the witness himself. He cannot prove any record. I certainly must not have full understood, unless I proceeded with the idea that the certified copy would be obtained and filed, as I told counsel at the conclusion of the case they would be permitted to do. I think in view of all that was said in that discussion that counsel should be allowed to [391] procure and file a certified copy, and I shall permit him to do so. In that connection if counsel for the defendant desire to introduce any testimony on that subject, I shall reopen the case for the purpose of allowing them to do it.

Mr. CAMPBELL.—That is the legitimacy of the—
Mr. KINGAN.—We do.

The COURT.—And in connection with that, if counsel for the plaintiffs and the Bouldins desire to introduce any testimony, I will permit them to do so.

Mr. KINGAN.—We do, your Honor.

Mr. CAMPBELL.—Now, then, in order to keep our record straight we object to the application of Mr. Franklin to reopen the case to furnish this certified copy, upon the ground it is too late and that there is nothing in the record that accounts for the original of this will, that it is lost and may not be had. I understand your Honor gives him thirty days?

The COURT.—Yes.

Mr. CAMPBELL.—We except.

Mr. KINGAN.—Now, if the Court please, the Santa Cruz Development Company objects to the reopening of the case so as to permit the defendants Wise to produce additional evidence, in that the said Wises rested their case and did not at any time request the Court, during the trial or afterwards up until this day, to offer or produce any additional evidence; that no showing has been made for the reopening of the case, and that on the record they are not entitled to have the case reopened and produce additional evidence.

The plaintiffs join in that objection and exception to the ruling of the Court, and ask permission of the Court to have their exception regarded as made in full. [392]

The COURT.—It may be so regarded.

Mr. CAMPBELL.—The Bouldin defendants will join in the particular objection made by the Santa Cruz Development Company and ask the same exception.

The COURT.—The same exception may be taken.

Thereafter and on the 1st day of November, 1915, the opening day of the November term, the said cause again came up for hearing before the Court, counsel for all the parties being present in open court, except the defendant Rifenburg, whose default had theretofore been duly entered, and thereupon counsel for Joseph E. Wise moved the Court, under the leave heretofore granted by the Court, to offer in evidence and to file a duly certified copy of the original will of Luis Maria Cabeza de Baca, with petition of the executor and order of the Governor thereon, the original being on file in the office of the Surveyor General of New Mexico, to which is annexed a translation, the said certified copy having been filed with the clerk within the thirty days allowed by the Court.

Thereupon Mr. Kingan, counsel for plaintiffs, objected to the introduction in evidence of the said document on the ground that it is irrelevant, immaterial and incompetent, and does not tend to prove any of the issues in this case in this: That the alleged will and petition show that Luis Maria Baca had a deceased son, but does not show that said son was Antonio; that it appears that said son, whatever his name may have been, had received advances and was not entitled to inherit, and consequently was not one of the heirs of Luis Maria Baca within the meaning of the granting statute, nor were his wife or children,

if there were any children; that the question of the right to inherit under the [393] document offered in evidence was referred to in the courts, and it does not appear that the adjudication upon the right to inherit was in favor of the heirs of this alleged son, even if he were Antonio; that the sixth section of the Act of Congress of June 21, 1860, declares that it shall be lawful for the heirs of Luis Maria Baca who make claim to the Las Vegas Grant to select certain lands, of which the land in question here, Baca Float No. 3 is a part; and that the heirs of the alleged Antonio, the grantors of the defendants Joseph E. and Margaret W. Wise, did not make claim to said land, or present any claim for same.

In which objection the Santa Cruz Development Company and the defendants Bouldin joined.

The objection of said counsel was overruled and the said duly certified copy of said petition, will and order thereon, was allowed to be filed and introduced in evidence, to which ruling of the Court, plaintiffs, defendant Santa Cruz Development Company and the defendants Bouldin, by their respective counsel, then and there duly excepted. Said instrument was marked "Defendants Wise Exhibit 39," and the original, in Spanish, and the translation thereof, are in words and figures following, to wit: [394]

Defendants Wise Exhibit 39.

Said instrument was marked "Defendants Wise Exhibit 39," and the original, in Spanish, and the translation thereof, are in words and figures (the nature of the case requiring that they be printed in full):

SELLO CUARTO.

Balga por los años de 1827 y 1828. (Rubric).

Sor Gefee Politico.

El C. Migl Vaca Vec^o de la Cienega Jurisdon de Sta Fee, ante Ve con el respecto Devido paresco y digo: Que estando mi finado herm^o Luis Ma Baca en los ultimos peridodos de su vida, deceso de morir cristianamte y ne haver autoridad en aquel momento que autorisara su ultima^a voluntad lo qe solicito con grandes ansias, como consta por oficio qe para en ni poder, y por las graves circunstancias en qe se hallaba me confirio poder vastante ante testigos es toda providad para qe vajo de responsabilidad ante Dios y los homas instruyera su disposicion testamentaria segun los reservados me comunico cuyo documto humildemente acompaño.

Y como quiera qe asepte este escrupuloso encargo, me veo estrechade adarles su deuido cumplimiente el qe los heraderos unamimes y conformes han adaptado sin necesidad de recursos ni esperar a qe constara por escrito conformandose con lo que practicara aserca del reparte de bienes y demas desposiciones; en cuyo supuesto he precedido con la mayor sinceridad y conformidad de partes. Mas como en este ha querido formar [395] question Franca Garviso muger de fue de un hijo de mi finado herm^o de querer entrar en parte con igualdad a les demas herederor, y estando yo bien instruido por mi finado hermano, y haci mismo constar por lists entre las dependencias el cargo que resulta contra el citado hijo de mi finado hermano, de estar satisfacho de su patrimonio paterno y materno con crecida ventaja

a los demas fuera del espresado cargo; yo como debe eumplir forsomante su voluntad y disposicion de mi poder dante me he resistido a esta gestion qe ha dado lugar a comparecer ante el Alce a qn no le manifieste de palagra la facultad con qe ebraba como poder abiente cuyo instrumte por falta del requisito de su autorisacion quiere anular, quando el mismo documto manifiesta la necesidad qe en el acte de su instruccion hubo para dhã falta, a mas qe el aucusilio qe a todo hombre le queda en seme jantes lanses o insidentes son los testiges antes quienes profiere clara y distintante su disposicion ques la miema necesidad autorisa V. g. como los que mueren en el campo & por lo qe las layes dan por bastante estas causas.

En tal concept y en obio de disturbios qe se pueden originar por el imprudente juicio del citado Alcalde.

A. Vs. Supco se sirva decretar ne se perturbe el buen orden y se deje libertad pa proceder religiosamente segun el encargo se me haconfierido, y quedar complida la ultima voluntad del etorgante a esto se contrahe mi solicitud y de ella espero la justicia qe impotre.

Albuquerque, Sept. 12 de 1827.

JOSE MIGUEL BACA (Rubric) [396]

SELLO CUARTO.

Valga por el Sello 3° para los Anos de 1827 y 1828.

Por al presente concedo todo mi poder y facultad quante por derecho se requiero y necessario fuese al ciudadano Miguel Baca mi hermano para que representando mi propia persona (despusa de mi muerte), derechos i axines pueda otorgar mi testamento y sea tan valedero como si yo mismo lo hiciera cuyo poder

le transfieropor ayarme en los ultimos yastantes de mi vida de una erida que repen repentinemento e recibido y siendo mi voluntad morir como cristiano le encargo a mi dho poder dante ovre arreglado a su conciencia por el amor de Dios con todo dominio sin que por falta de requisito clausa o termino deje de ser valedero este mi poder que con toda mi voluntad le trasfiero como mi ultima disposicion testamentaria no siendo de ningun valor ninguna otra que aparesca y para que tenga toda la fuersa y valor necesario y avermo faltado en esta ocacion un juez lo autorise suplique al ciudadano Franco Serracino lo firmara por mi poniendo mi nonvre y appellido y de mi propia mano una cruz siendo testigos de estas voces Pablo Montel la y Agustin Jaramillo y el enuncido Sarracino.

Pena Blanca, May 27 de 1827.

LUIS MA CABEZA DE BACA. X

PABLO MONTOYA. X

FRANCO SARRACINO (Rubric).

AGUSTIN HARAMILLO (Rubric).

Acuerdo de lo que debo y me deben y de lo qe deben hacer los ejecutores de mi ultima voluntad. ASV.

Yt Do, deber un hermano de Olguin un nobio de tres anos mando es pague.

Yd Un Macho y una ternera a D Fernando Canpa.

[397]

Yd Un potrio de dos anos a Miguel Olona.

Ys A Miguel Baca mi hijo una mula.

Yd a Juan Anto Mi hijo una baca y un mulate de la nacensi nacensia.

Yd a da Franco Chaves 60 ps.

Yt de que lo qe a mi me deben todo costa por las listas
qe paran en mi poder mando se cobre.

Yt mando qe deajo a mi esposa y sus hijos del camino
reals hasta el rio y de la hera que esya delante
do la casa de Jose para abajo anta donde alcanza
mi lindero con la mita de mi casa.

Yt de Qe a Juan Anto mi hijo la tengo pagado cien
baras de tierra del eaucito para abajo.

Yt mande que la demas tierras delse conosen por mias
se reparta entre todos mis herederos pos yguqls
partes escepto to el sitio de Santa Cruz qe solo
queda abeneficio de los dos mayores por qe asi
me lo manda mi conciencia por ser estos los qe
trabajaron todo lo qe tengo.

Yt mando qe todas las listas y papeles se le entreguen
a mi apoderado para qe por ellas arregle mis
negocios.

Yt mando a mi apoderado qe si resultare dever al-
guna cosa justificade qe sea se pague. Ygual-
mente mando a mi muger a hijos bajo toda re-
sponsabilidad y pena de mi maldicion ne se sal-
gan un punto de lo qe a mi apoderado disponga
y haga ques como catolico christiano qe soyle
comunidado y sinquesto de todos mie asuntos
y a quien le encargo la conciencia con el e descar-
gado la mia para qe por virtud del anterior poder
haga todo lo qe ye podia aber echo en bida.

Yt mando por conclusion qe a mi esposa Ma Encar-
nacion [398] Lucero le den trecientas vs de
tiera de las qe heran de Jose Miguel Apodaca.

Yten. concluyo firmando en los terminos qe consta
por no tener mas tiempo y estar ya en los ultimos

restantes de mi vida en la Pena Blanca hoy 28
de Mayo de 1827.

LUIS MARIA CABEZA de BACA,
PERSEGUIDO (Rubric).

Tgo.

PABLO MONTOYA.

Tgo.

AGUSTIN JARAMIO.

Albuquerque, 7bre 12 de 1827.

El Alcalde constl de Cochiti tendra por valido el poder que el finado Luis Ma Caveza de Baca dio a su hermano Du Migual y por lo qe respecta a los reclamos que haga franca garviso oira a ambas partes y dispondra arreglado a justicia, entondido que si en vida se le dio alguna cosa a su difunto esposo sora revajado de lo que por fin y muerte de su padre le corresponda.

ARMIJO (Rubric).

Department of the Interior,
Office of U. S. Surveyor General,
Santa Fe, N. M.

I, Lucius Dills, U. S. Surveyor General for the District of New Mexico, hereby certify that the foregoing typewritten pages, numbered from one to four inclusive, have been carefully compared and that they contain a true and correct copy of the original document now in the Archives in my office.

Witness my hand and official seal at my office in the city of Santa Fe on this the 6th day of October, A. D. 1915.

[Seal]

LUCIUS DILLS,

U. S. Surveyor General for New Mexico.

[Int. Rev. Stamp. 10¢.—Canceled.] [399]

FOURTH SEAL.

Legal for the years of 1827 and 1828.

Mr. Jefe Politico:

I, the C. Migl Vaca *Vaca* from Cienega Jurisdiction of Santa Fe, before you with due respect appears and says: That being in his last instants of his life my deceased brother Luis Ma Vaca and willing to die as a Christian and not being in that moment any authority to authorize his last will, that he has been anxiously requesting, as it appears from official letters in my position, and for critical conditions in which he was, he did confer to me a competent power before witnesses of all capacity to act under the responsibility before God and men to instruct his dispositions as per particulars which he did communicate to me which document I here enclose you.

And as I did accept this escroupulous trust, I feel obliged to give right addomplishment to which all the heirs unanimously and in conformity have adopted without any other resources nor having to wait for a writing conforming themselves with all my acts in regard of the division of the property and with all dispositions; in this I have been proceeding with the best of my sincirety and with the conformity of all parties. But as in this matter, Franco Garviso, who was the wife of a son of my deceased brother has been willing to make trouble claiming an equal part with the other heirs and being I instructed by my deceased brother, and appearing for the lists in the business the charge to the referred son of my brother, he has been satisfied of all his patrimony fatherly and motherly with great advan-

tage to the others, out of the mentioned charge; as I have the duty to accomplish the will and disposition of my constituent I have rejected this claim, having been obliged to apply before the Alcalde to whom I did not expose by word the authority with which I have been acted as empowered, instrument which he for the lack of the requisite of his authorization is willing to annul, when the same document sets for the necessity for which such an act of its instruction had for the said fault, moreover that the resources that all men have in such cases or instances are the witness before whos declares and sets for clearly and distinctly his will that the said imperiosity authorices e. i. those who die out of the country and for whose the law sets for sufficient those causes.

By this concept and avoiding any disturbances that my happen by the imprudent judgment of the mentioned Alcalde.

I beg you to decret that the good order not be purturbed and that I be at liberty to proceed religiously according to the trust that have been conferred to me, and that the last will of the grantor be fulfilled, this is in essence my solitud and I do wait the [400] proper justice.

Albuquerque Set. the 12th of 1827.

JOSE MIGUEL VACA (Rubric).

FOURTH SEAL.

Legal for the Thirth Seal for the years of 1827 and 1828.

By this I do grant all my power and authority that in right is required and were necessary to the citizen Miguel Vaca, my brother for the representation of

my person (after my dead) rights and actions he can execute my will and this to be as legal as if it were made by my own self this power I give to him being myself in the last moments of my life from a wound that I suddenly have received and willing to die as a christian I entrust to my said constituent to act according to his own concieny for the love of God and with all dominion without for lack or requisite clause or term fail to be valid this my power which with all my will grant as my last disposition, execution not being of any value any other who appears, and to, give all the necessary force and value and not having at hand in this occasion a judge for its authorization I did beg to citizen Franco Serre- cino to sign it for me setting my first and second names and by my own hand a cross being witness of this words, Pablo Montella y Agustin Jaramillo and the said Sarracino.

Pena Blanca May the 27th of 1827.

LUIS MA CABEZA DE BACA. X

PABLO MONTOYA. X

FRANCO SERRACINO (Rubric).

AGUSTIN JARAMILLO. (Rubric).

Agreement of my debits and credits and instruc- tions of duties to the executors of my last will. ASV.

- It. Due to a brother of Olguin one three years steer,
I order to be paid.
- It. One he-mule and one heifer to D. Fernando
Campa.
- It. One two hears colt to Miguel Olona.
- It. To Miguel Baca my son one mule.
- It. To Juan Auto my son one cow and one young
he-mule from the coming season.

- It. A. D. Franco Dhavez 60 ps.
- It. That of my credits all are included in lists which are in my possession, I order to be collected.
- It. I order that the legacy to my wife and her sons be, from the real road to the river and from the patch in front of Jese's house down to reach my border line to half of my residence.
- It. That I have already paid to my son Juan Anto one hundred varas of land from the Saucito down.

[401]

- It. I order that the balance of lands that are known as mine to be divided between all my heirs by equal parts, except the Santa Cruz place which will be to the benefit of the two elders because it so orders my conciency being those the ones who had been working all that I have.
- It. I order that all the lists and papers be turned order to my empowered to the conduction of my affairs.
- It. I order to my empowered that if it appears anything that I owe if it is just to be paid. I also order to my wife and sons under all responsibility and the penalty of my malediction do not to go out of the deeds and dispositions of my empowered a period, that as an christian and catholic that I am have instructed and communicate to him all my affairs and to whom I burden his conscience to discharge mine and by virtue of the former power he will act doing all which I could do in life.

It. I close in the terms set forth not having any more time for being in the, last moments of my life at Pena Blanca this the 28th day of May, 1827.

LUIS MARIA CABEZA de BACA.
PERSEGUIDO (Rubric).

Witness:

PABLO MONTOYA.

Witness:

AGUSTIN JARAMILLO.

Albuquerque, Set. 12th of 1827.

The constitutional Alcalde of Cochiti shall have as valid the power that the deceased Luis Maria Cabeza de Baca has conferred to his brother Dn. Miguel and with regard to the claims of Franca Garviso he shall hear both parties and pass judgment adjusted to justice, with the understanding that if something was given in life to his deceased husband it will be deducted of that which at last and for the dead of his father he should be entitled.

ARMIJO (Rubric).

DEPARTMENT OF THE INTERIOR.

Office of U. S. Surveyor General,
Santa Fe, N. M.

I. Lucius Dills, U. S. Surveyor General for the District of New Mexico, hereby certify that the foregoing typewritten pages, numbered from one to four inclusive, have been carefully compared and that they contain a true and correct copy of the original document now in the Archives in my office.

Witness my hand and official seal at my office in

the city of Santa Fe, on this the 6th day of October, A. D. 1915.

[Seal]

LUCIUS DILLS,

U. S. Surveyor General for New Mexico. [402]

Thereupon Mr. Franklin, counsel for Joseph E. Wise, offered in evidence a copy of a judgment rendered by the District Court of the Territory of New Mexico, in and for the County of Bernalillo, in the year 1900, in the case of Joseph L. Perea vs. Louis Sulzbacher et al.—being the case referred to during the trial of this case—wherein that Court found that Antonio Baca, or Jose Antonio Baca, as he is also called, was a son of Luis Maria Baca.

Plaintiffs, defendants Bouldin and Santa Cruz Development Company, objected to the introduction in evidence of said document for the reason and upon the ground that the Court opened the case for one purpose only—to permit counsel for Wise to file a certified copy of one paper which had been introduced in evidence and had not been properly certified.

Objection sustained, and the Court refused to permit counsel for Wise to file said certified copy of said judgment, to which ruling of the Court the defendant Joseph E. Wise then and there duly accepted.

Thereupon counsel for Joseph E. Wise asked the Court that the said certified copy of the decree which he offered, be taken under Rule 46, that is to say, taken up and put in the record. The Court declined to receive said instrument under Rule 46.

Thereupon counsel for Joseph E. Wise offered in

evidence a duly certified copy of the affidavit of Prudencio Baca, which heretofore he moved the Court to introduce, in his motion to set aside the submission of the case, heretofore referred to, being a duly certified copy of the affidavit of Prudencio Baca that was referred to during the trial of the case. [403]

Mr. CAMPBELL.—If the Court please, we renew all the objections we heretofore made to it, and on the further ground that it is incompetent and irrelevant.

The COURT.—Objection sustained.

Mr. FRANKLIN.—I will ask, then, that our exception be duly noted to the ruling of the Court, and I will ask that this be made a part of the record under Rule 46.

Mr. KINGAN.—Rule 46 has nothing to do with this.

The COURT.—I decline to make it a part of the record under Rule 46, because Rule 46 contemplates that such testimony as shall be offered in open court while the case is in progress and not admitted in evidence, may be taken under the rule; and it does not contemplate that after a case has been opened for one purpose only, that a party to the cause may then introduce any and all evidence in the case that they may so desire to introduce under the guise of offering it under Rule 46.

Thereupon counsel for Santa Cruz Development Company moved the Court, on the objections of the defendants Santa Cruz Development Company and Joseph E. Wise to the introduction in evidence of the Wrightson bond Plaintiffs' Exhibit "L," to

strike the same from evidence. The motion was denied and an exception taken.

Thereupon the Court rendered its judgment and decree as fully set forth in the decree on file and of record herein.

Thereupon the plaintiffs, the defendants Bouldin and the defendants Joseph E. Wise and Lucia J. Wise (the intervenors joining with said defendants Wise) in open court, at the time of the rendition of the decree presented their respective petitions for leave to appeal with assignments of error and undertaking on appeal. Said applications were forthwith allowed in open court and the undertakings approved. [404]

Thereupon, in open court, at the same time and term of the rendition of the decree, Santa Cruz Development Company presented its petition for leave to appeal with its assignments of error. For proceedings thereon see order entered.

The defendants Jesse H. Wise and Margaret W. Wise, by their solicitor announced in open court at the time of the rendition of the decree, that they would not appeal. [405]

Appendix.

For the purposes of convenience Defendants Wise Exhibits 19, 20, 21, 22, 23 and 26, hereinbefore referred to are here inserted, being each respectively in words and figures following, to wit: [406]

Defendants Wise Exhibit 19.

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

JOHN IRELAND and WILBUR H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

COMPLAINT.

Plaintiffs complain and allege:

I.

That said John Ireland is a resident of the town of Seguin, State of Texas; that said Wilbur H. King is a resident of Sulphur Springs, Hopkins County, in the said State; and that said David W. Bouldin is a resident of the city of Austin, Travis County, in said State:

II.

That on the 22d day of March, 1888, said defendant made and delivered to said plaintiffs for a valuable consideration his certain promissory note in words and figures as follows, to wit:

“Twelve months after date, for value received, I promise to pay John Ireland and Wilburn H. King, in lawful money of the United States, and at the First National Bank of and in the city of Austin, Travis County, Texas, the sum of five thousand (\$5000) Dollars, with interest from date at the rate of ten (10) per cent per annum.

This note is given and to be paid according to its legal tenor and effect, for an undivided interest of one-third of one-third in and to a certain tract of land in Pima County, in the Territory of Arizona, and more particularly described in a 'bond for title' to said undivided interest in said land, given me by said John Ireland and Wilburn H. King and bearing even date herewith; that is to say, March 22d, 1888.

In the event default is made in the payment of this note at maturity, and it is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional [407] amount of ten (10) per cent on the principal and interest of this note shall be added to the same as collection fees.
Austin, Travis County, Texas.

March 22d, 1888.

D. W. BOULDIN.

III.

That said plaintiffs are now the owners and holders of said note and that no part of the said principal sum or interest has ever been paid, but that the whole thereof both principal and interest is now due and owing from said defendants to these plaintiffs.

IV.

That the said defendant David W. Bouldin is the same person who signed said note under the name of D. W. Bouldin and that said signature was meant and intended to be the signature of said David W. Bouldin, defendant as aforesaid.

V.

That the amount now due on said note for principal and interest is the sum of seven thousand four hundred and forty-five dollars and eighty three cents, and that the ten per cent provided in said note for counsel fees in case of suit amounts to the sum of seven hundred and forty-four dollars and fifty-eight cents.

WHEREFORE plaintiffs pray judgment in the sum of said principal sum of five thousand dollars together with interest thereon at the rate of ten per cent per annum from the date of said note, and for the further sum of seven hundred and forty-four dollars and fifty-eight cents as attorney's fees thereon; together with their costs of suit.

FRANCIS J. HENEY,

Attorney for Plaintiffs.

[Endorsed]: Filed March 13th, at 4:30 P. M. 1893. Brewster Cameron, Clerk. By Chas. Bowman, Deputy Clerk. [408]

*In the District Court of the First Judicial District of
the Territory of Arizona, in and for the County
of Pima.*

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,

Summons.

Action brought in the District Court of the First Judicial District in and for the County of Pima, the Territory of Arizona.

The Territory of Arizona sends Greeting to David W. Bouldin.

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the District Court of the First Judicial District in and for the county of Pima, in the Territory of Arizona, and answer the complaint filed with the clerk of this court, at Tucson, in said county, within ten days (exclusive of the day of service) after the service upon you of this Summons, if served in this county; but if served out of the county and within this district, then within twenty days; in other cases thirty days.

And you are hereby notified that if you fail to appear and answer the complaint as above required, judgment by default will be taken against you.

GIVEN UNDER MY HAND and the Seal of said District Court at Tucson, this 13th day of March, A. D., 1893.

BREWSTER CAMERON,

Clerk.

By Chas. Bowman,
Deputy Clerk. [409]

Territory of Arizona,
County of Pima,—ss.

Paul Hermans being duly sworn, deposes and says that he is an employe of the Arizona Daily and

Weekly Star, a newspaper of general circulation, printed and published in the city of Tucson, County of Pima Arizona Territory; that the Summons of which the annexed is a copy, was published in the said Arizona Daily Star for the period of 30 days from the 15th day of March, 1893, to the 15th day of April, 1893, inclusive.

PAUL HERMANS.

Subscribed and sworn to before me this 18th day of April, A. D. 1893.

BREWSTER CAMERON,
Clerk,
Charles Bowman,
D. C.

Office of the Sheriff,
County of Pima,—ss.

I hereby certify that I received the within summons at 10 o'clock A. M., on the 14th day of March, A. D., 1893, and served the same on the 15th day of March, A. D., 1893, on David W. Bouldin, being the defendant named in the summons, by publishing it in the Daily Star, a newspaper published daily in the city of Tucson, Pima County, Arizona Territory, for the period of thirty days, commencing on the 15th day of March, the affidavit of publication and a copy of said publication are hereto attached.

J. B. SCOTT.

By F. L. Proctor,
Under-Sheriff.

[Endorsed]: Filed April 22, 1893. Brewster Cameron, Clerk. By S. Ainsa, Deputy Clerk. [410]

*In the District Court of the First Judicial District of
the Territory of Arizona in and for the County
of Pima.*

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendants.

Territory of Arizona,
County of Pima,—ss.

Francis J. Heney being duly sworn deposes and says that he is the attorney for plaintiffs in the above-entitled action; that the defendant is a non-resident of said Territory of Arizona and resides at the city of Austin, Travis County, State of Texas.

FRANCIS J. HENEY,

Subscribed and sworn to before me this 13th day of March, 1893.

[Seal]

B. W. TICHENOSE,
Notary Public,
Pima Co., Ariz.

[Endorsed]: Filed March 13, 1893, Brewster Cameron, Clerk. By Chas. Bowman, Deputy Clerk.

[411]

*In the District Court of the First Judicial District
of the Territory of Arizona in and for the
County of Pima.*

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

Affidavit on Attachment.

Francis J. Heney being first duly sworn, deposes and says: That he is the attorney for the plaintiffs in the above-entitled action. That the above-named defendant in said action is indebted to John Ireland and Wilburn H. King in the sum of eight thousand, one hundred and ninety and $41/100$ dollars over and above all legal setoffs or counterclaims upon an expressed written contract for direct payment of money, to wit: Upon his promissory note for the sum of five thousand dollars dated March 22d, 1888, bearing interest at ten per cent per annum and providing for the payment of ten per cent on both principal and interest, for attorney's fees in case of suit; and that such contract is payable in this Territory; and that said defendant does not reside in the Territory of Arizona.

That the sum for which the attachment is asked is a *bona fide* existing debt, due and owing from the defendant to the plaintiffs; and that the attachment is not sought for wrongful or malicious purpose and the action is not prosecuted to hinder, delay or de-

fraud any creditor or creditors of the defendant.

FRANCIS J. HENEY.

Dated _____ 1893.

Subscribed and sworn to before me this 13th day of March, 1893.

[Seal]

B. W. TICHENOSE,
Notary Public, Pima Co., Ariz.

[Endorsed]: Filed March 13, 1893, Brewster
Cameron, Clerk, By _____. [412]

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

Bond on Attachment.

Territory of Arizona,
County of Pima,—ss.

We, the undersigned, John Ireland and Wilburn H. King as principals, and Benj. Heney and John Gardiner as sureties, acknowledge ourselves bound to pay to David W. Bouldin the sum of sixteen thousand four hundred dollars, conditioned that the above-bound John Ireland and Wilburn H. King plaintiffs in attachment against the said David W. Bouldin defendant, will prosecute his said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrong-

fully suing out such attachment.

WITNESS our hands this 23 day of February
A. D., 1893.

WILBURN H. KING,
JOHN IRELAND,
BENJ. HENEY.
JOHN GARDINER.

Approved:

BREWSTER CAMERON,

Clerk.

Chas. Bowman,

D. C.

[Endorsed]: Filed Meh. 13, 1893. Brewster Cam-
eron, Clerk. By Chas. Bowman, Deputy Clerk.

[413]

Sheriff's Office,
Pima County, A. T.

By virtue of the annexed writ I duly attached the
following described property belonging to the
defendant, to wit:

Location number three (3) being one of five tracts
of land, selected and located by virtue of and in ac-
cordance with the provisions of the sixth section of an
act of Congress of the United States approved June
21st, 1860, entitled an act to confirm certain private
land claims in New Mexico, and found in volume
twelve (12) page 72 of the United Statutes at Large,
for further and better description of the above-de-
scribed property see No. 14 page 597 and following
pages, Deeds of Real Estate in the Recorder's Office
at Tucson, County of Pima, Arizona Territory.

The above-described property was attached on the

14th day of March, 1893, at 4 P. M., no personal property being attached.

J. B. SCOTT,
Sheriff,
F. L. Proctor,
Under-sheriff. [414]

*District Court of the First Judicial District of the
Territory of Arizona, in and for the County of
Pima.*

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,

Defendant.

Writ of Attachment.

The Territory of Arizona to the Sheriff or any Constable of the said County of Pima, Greeting:

WE COMMAND that you attach forthwith so much of the property of David W. Bouldin, if to be found in your county, replevable, on security, as shall be of value sufficient to make the sum of \$5000 Dollars, with interest at the rate of 10% per annum from March 22d, 1888, until date, and the probable costs of suit, to satisfy the demand of John Ireland and Wilburn H. King, and that you keep secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before the Court, and that you make return of this writ showing how you have executed the same.

WITNESS, Hon. R. E. SLOAN, Judge of said District Court, at the Courthouse in the said County of Pima, this 13th day of March, 1893.

ATTEST my hand and the seal of said court, the day and year last above written.

BREWSTER CAMERON,

Clerk,

By Charles Bowman,

Deputy Clerk.

[Endorsed]: Filed April 22, 1893, Brewster Cameron, Clerk. By S. Ainsa, Dep. Clk. [415]

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

JOHN IRELAND and WILBUR H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,

Defendant.

Now comes the defendant and demurs to plaintiffs' complaint herein on the grounds that the same does not state facts sufficient to constitute a cause of action.

SELM M. FRANKLIN,

Attorney for defendant.

And in answer to the said complaint defendant denies each and every allegation therein; and defendant further denies that there was any valuable consideration or any consideration whatsoever paid unto him by plaintiffs, or either of them, or at all

for the execution or delivery of the promissory note mentioned and described in plaintiffs' complaint.

And for a further answer, defendant avers that on the 22d day of March, 1888, in the State of Texas, the said plaintiffs did agree to grant, bargain, sell and convey unto this defendant by a good and sufficient deed an undivided one-ninth interest of a certain tract of land, situate in the county of Pima, in the Territory of Arizona, and commonly known and called the "Baca Float No. 3," and that in consideration of said deed so to be made, executed and delivered by plaintiffs unto defendant, this defendant did execute and deliver unto plaintiffs the promissory note mentioned and described in plaintiffs' complaint herein; that said plaintiffs and both of them did fail and refuse to execute and deliver unto defendant a good and sufficient deed, conveying unto him the said undivided one-ninth interest in and to the property [416] aforesaid; and defendant further avers that said plaintiffs had no title whatever or interest in the said property agreed to be conveyed by them, and that they could not make any title thereto or to the undivided one-ninth interest which they agreed to convey, and therefore that the consideration of said promissory note has entirely and utterly failed and that said promissory note was given without any consideration whatsoever.

WHEREFORE, defendant prays judgment that plaintiffs take nothing by this action and defendant be hence dismissed with his costs.

SELIM M. FRANKLIN,
Attorney for defendant.

[Endorsed]: Filed May 10, 1893, Brewster Cameron, Clerk. By Chas. Bowman, Deputy Clerk.
[417]

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

JOHN IRELAND and WILBUR H. KING,

vs.

DAVID W. BOULDIN.

This cause came on regularly for trial on the 2d day of May, 1895, Francis J. Heney, appearing as counsel for plaintiffs and Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, appearing in his own proper person as the defendant in said cause by reason of the death of said David W. Bouldin having been suggested to the Court and said Leo Goldschmidt as such administrator having been substituted as defendant in said cause by order of the above-entitled court. A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court sitting without a jury, and witnesses were duly sworn and examined and evidence was introduced, and it having been clearly proven that the claim sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, after he had duly qualified as such administrator and during the pendency of this action, and it further appearing that he had rejected the same, the cause was submitted to the Court for consideration and

decision; and after due deliberation thereon the Court finds all the issues for the plaintiffs.

Wherefore it is ordered, decreed and adjudged that John Ireland and Wilbur H. King, the plaintiffs, do have and recover from Leo Goldschmidt, as administrator of David W. Bouldin, deceased, the sum of eight thousand, five hundred and fifty dollars, with interest thereon at the rate of ten per cent per annum from the date hereof until paid, together with plaintiffs costs and disbursements incurred in this action, amounting to the sum of \$34.45, and that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased.

And it further appearing to the Court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied upon all of the right, title and interest of David W. Bouldin in and to the following described real estate, lying, being and situate in the county of Pima, Territory of Arizona, to wit, Location No. three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in volume 12, page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formally Dona Ana County, New Mexico, beginning at a point one mile and a half from [418]

the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres, and thirty-nine hundredths of an acre more or less.

And it further appearing to the Court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this Court, under the seal of this Court, directed to the sheriff of the county of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W. Bouldin in the above-described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.

J. V. BETHUNE,

Judge.

Done in open court this 2d day of May, 1895.

Territory of Arizona,
County of Pima,—ss.

I, Andrew J. Halbert, Clerk of the District Court, in and for Pima County, Territory of Arizona, do hereby certify that the foregoing is a full, true and correct judgment-roll in the case entitled John Ireland et al., vs. David W. Bouldin, as appears to us of record.

ATTEST my hand and seal of court, this 2d day of May, A. D., 1895.

ANDREW J. HALBERT,
Clerk.

By W. P. B. Field,
Deputy. [419]

[Endorsed]: Filed May 2d, 1895. Andrew J. Halbert, Clerk. M. P. B. Field, Deputy Clerk.

*In the District Court of the First Judicial District of
the Territory of Arizona, in and for the County
of Pima.*

JOHN IRELAND and WILBUR H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

Memorandum of Costs and Disbursements.

DISBURSEMENTS.

Sheriff's fees.....	\$19.70
Clerk's fees.....	14.75
Total.....	34.45

Territory of Arizona,
County of Pima,—ss.

Francis J. Heney, being duly sworn deposes and says: That he is the attorney for the plaintiffs in the above-entitled action, and as such, is better informed, relative to the above costs and disbursements therein, than the said John Ireland and Wilbur H. King. That the items in the above-memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

FRANCIS J. HENEY,

Subscribed and sworn to before me this 3d day of May, A. D. 1895.

A. J. HALBERT,
Clerk.

[Endorsed]: Filed May 3rd, 1895. A. J. Halbert,
Clerk. [420]

Office of the Sheriff,
County of Pima,—ss.

I hereby certify that I received the annexed Order of Sale at 5:30 P. M. on the 3d day of July, 1895. And under and by virtue of said order of sale, I did, on the 5th day of July, 1895, levy upon all of the right title, claim and interest of the within-named

defendant, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in and to the following described real property, lying, being and situate in the county of Pima, Arizona Territory, to wit; Location number three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21st, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in volume twelve, page 72 of the United States Statutes at Large, said Location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction North forty-five degrees east of the highest point of said mountain running thence from said beginning point west twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links, thence east twelve miles, thirty-six chains and thirty-four links, thence east twelve miles, thirty-six chains and thirty-four links, thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale, by posting notices of said sale in three public places, one of which was at the courthouse door and also by advertising in the "Citizen" a daily

newspaper of general circulation published in the city of Tucson, Pima County, Arizona Territory, a copy of which is hereto attached, from the 8th day of July, 1895, until the 31st day of July, 1895, daily and successively. And I further certify that I did attend at the hour, time and place advertised for said sale and offered for sale a part of said property for sale and received no bid. I then offered two parts of said property for sale and received no bid. I then offered three parts of said property for sale and received no bid, then I offered the whole of said property for sale, and received a bid of two thousand dollars (\$2000); that being the highest and best bid offered in lawful money of the United States, the said property was sold to Wilbur H. King.

R. N. LEATHERWOOD,
 Sheriff,
 By W. H. Taylor,
 D. S.

NOTICE OF SHERIFF'S SALE.

JOHN IRELAND and WILBUR H. KING,
 Plaintiffs,

vs.

LEO GOLDSCHMIDT, Administrator of the Estate
 of David W. Bouldin, Deceased. [421]

Under and by virtue of an execution and order of sale issued out of the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, on the 3d day of July, A. D. 1895, and to me as sheriff duly directed and deliv-

ered, on a judgment rendered in said court, in the above-entitled action, on the 2d day of May, A. D., 1895, for the sum of eight thousand five hundred and eighty-four dollars and forty-five cents (8584.45) with interest thereon at the rate of ten per cent per annum, until paid, together with the foreclosure of plaintiffs' attachment lien upon the following described property in Pima County, Territory of Arizona, upon which I have duly seized and levied, and in said order of sale described as Location Number Three, being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the 6th section of an act of Congress of the United States, approved June 21st, 1860, entitled "An Act to confirm certain Private Land Claims in New Mexico," and found in volume twelve, page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formally Dona Ana County, New Mexico, beginning at a point one mile and one-half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and thirty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning; and containing ninety-nine thousand, two hundred and eighty-nine acres and 39-100 of an acre, more or less; as said attachment lien existed on the 14th day of March, A. D., 1893.

Public notice is hereby given that I will at the courthouse door of the said county of Pima, at the hour of ten o'clock A. M. on Wednesday, the 31st day of July, A. D., 1895, sell at public auction to the highest and best bidder for cash, in lawful money of the United States, all the right, title, claim and interest both legal and equitable of the above-named defendant, in, of and to the above-described property and all the right, title and interest, both legal and equitable which said David W. Bouldin, deceased, had at the time of his death, in, of and to the above-described property, or so much of said property as may be necessary to satisfy said judgment and costs of suit and all accruing costs.

R. N. LEATHERWOOD,
Sheriff.

Dated July 8, 1895. [422]

*In the District Court of the First Judicial District of
the Territory of Arizona, in and for the County
of Pima.*

JOHN IRELAND and WILBUR H. KING,

vs.

DAVID W. BOULDIN.

This cause came on regularly for trial on the 2d day of May, 1895, Francis J. Heney appearing as counsel for plaintiffs and Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, appearing in his own proper person as the defendant in said cause by reason of the death of said David W. Bouldin having been suggested to the Court

and said Leo Goldschmidt as such administrator having been substituted as defendant in said cause by order of the above-entitled court. A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court sitting without a jury, and witnesses were duly sworn and examined and evidence was introduced and it having been clearly proven that the claims sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, after he had duly qualified as such administrator, and during the pendency of this action, and it further appearing that he had rejected the same, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the Court finds all the issues for the plaintiffs.

Wherefore, it is ordered, decreed and adjudged that John Ireland and Wilbur H. King, the plaintiffs, do have and recover from Leo Goldschmidt, as administrator of D. W. Bouldin, deceased, the sum of eight thousand five hundred and fifty dollars, with interest thereon at the rate of ten per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$34.45 and that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of D. W. Bouldin, deceased.

And it further appearing to the Court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, levied upon all

of the right, title and interest of D. W. Bouldin in and to the following described real estate, lying, being and situate in the county of Pima, Territory of Arizona, to wit: Location number three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 1, 1860, entitled "An Act to Confirm certain private land claims in New Mexico," and found in volume twelve, page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains; thence north twelve miles, thirty-six chains and forty-four links to the [423] place of beginning, containing, ninety-nine thousand, two hundred and eighty-nine acres, and thirty-nine hundredths of an acre, more or less.

And it further appearing to the Court that said attachment suit should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same

is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the sheriff of the County of Pima, Territory of Arizona, directing him to seize and sell, as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said D. W. Bouldin in the above-described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.

J. D. BETHUNE,
Judge.

Done in open court this 2d day of May, 1895.

Territory of Arizona,
County of Pima,—ss.

I hereby certify that the annexed and foregoing is a full, true and correct copy of the original judgment and order of sale, in the case entitled John Ireland and Wilbur H. King vs. David W. Bouldin, now on file in my office.

WITNESS my hand and the seal of said court this 3 day of July, A. D. 1895.

[Seal] ANDREW J. HALBERT,
Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County.

W. P. B. Field,
Deputy Clerk.

[Endorsed]: Filed Aug. 6th, 1895. Andrew J. Halbert, Clerk. W. P. B. Field, Deputy Clerk.

*In the Superior Court of the State of Arizona, in
and for the County of Pima.*

No. 2177.

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

To the Honorable, the Superior Court of the State
of Arizona, in and for Pima County:

Now comes Joseph E. Wise and respectfully
represents to the court:

That on the 13th day of March, 1893, the above-named plaintiffs filed their complaint in the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, against the said David W. Bouldin, wherein they sought to recover judgment against him for the sum of \$5,000, with interest at the rate of 10% per annum upon a certain promissory note, and the further sum of \$744.58 attorney's fees and costs of suit; that thereafter, and on said 13th day of March, 1893, a summons was duly issued out of said court, in said action, which summons was thereafter, and on the 22d day of April, 1893, returned and filed with the clerk of said court, showing the manner of the service thereof; that thereafter and on the 10th day of May, 1893, the said defendant David W. Bouldin did file his demurrer and answer in said court to the said complaint; that on the said 13th day of March, 1893,

the said plaintiffs in said case did file affidavit and bond for writ of attachment, and on said day a writ of attachment did issue out of said court, in said case, directed to the sheriff [425] of said Pima County, requiring him to attach so much of the property of said David W. Bouldin in said county of Pima, as shall be of value sufficient to make said sum of \$5,000, with interest and costs.

That thereafter and on the 14th day of March, 1893, J. P. Scott, who then was the sheriff of said Pima County, did levy said attachment upon the following property of said defendant, to wit: "Location No. 3 (three) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress, of the United States, approved June 21, 1860, entitled "An Act to confirm certain private land claims in New Mexico, and found in volume 12 (Twelve) page 72 of the U. S. Statutes at Large, for further and better description of the above-described property see No. 41, page 597 and following pages Deeds of Real Estate in the Recorder's Office of Tucson, County of Pima, Arizona Territory"; which said writ of attachment, with said return of levy made by said sheriff endorsed thereon, was filed with the said court, on April 22, 1893.

That thereafter the said David W. Bouldin died, and one Leo Goldschmidt, as administrator of the estate of said David W. Bouldin, deceased, was substituted as defendant in the said cause by the order of the said Court, as fully appears from the minutes of said court; that thereafter, and on the 2d day of

May, 1895, the said District Court, aforesaid, did render judgment in said case in favor of the said plaintiffs for the sum of \$8,550, with interest and costs, and in said judgment did further adjudge and decree as follows:

“And it further appearing to the Court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied upon [426] all of the right, title and interest of David W. Bouldin in and to the following described real estate, lying, being and situate in the county of Pima, Territory of Arizona, to wit: Location No. three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21st 1860, entitled “An Act to confirm certain private land claims in New Mexico,” and found in volume 12, page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four

links to the place of beginning, and containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And it further appearing to the Court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, Therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the sheriff of the county of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title, and interest of said David W. Bouldin, in the above-described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale."

which said judgment was duly enrolled and filed as a record of said court on the said 2d day of May, 1895.

That thereafter an order of sale was duly issued out of said District Court under said judgment and decree, foreclosing said attachment lien, aforesaid, and was duly delivered to R. N. Leatherwood, the then sheriff of said Pima County, and that the said sheriff did, under and by virtue of the said execution or order of sale, sell all of the said prop-

erty [427] described in the said judgment aforesaid, at public sale, after giving due notice as required by law; that he did sell the same at public auction on the 31st day of July, 1895, to one Wilbur H. King, for the sum of \$2,000, as fully appears by the return of sale of said sheriff annexed to the said order of sale, and duly filed in said court, on the 6th day of August, 1895.

That a certificate of sale was issued by the said sheriff to the said Wilbur H. King and a duplicate original thereof was duly filed by said sheriff with the county recorder of said Pima County. A copy of the said sheriff's certificate of sale so executed by said sheriff and so filed with said recorder is hereto annexed and made a part hereof.

That no redemption was made from said sale, and thereafter one Lyman W. Wakefield, then sheriff of said Pima County did execute to the said Wilbur H. King, the purchaser at said sheriff's sale, his deed, wherein the said Wakefield, as sheriff, as aforesaid, did attempt to convey the said property, so sold, as aforesaid, to the said purchaser, Wilbur H. King; but that by inadvertence, or mistake, the said deed only purported to convey the right, title and interest which the said Leo Goldschmidt, administrator of the estate of said David W. Bouldin, deceased, had at the date of sale, and did not recite that the same conveyed the interest as had been attached as aforesaid, and foreclosed as aforesaid, under the said judgment of the said Court, aforesaid; and that the said deed contained other mistakes and discrepancies so that it is necessary that a new

deed be executed by the present sheriff of said Pima County, as successor of the said sheriff who made said sale, so as to correct the errors in said deed executed by the said Lyman W. Wakefield, as aforesaid.

A copy of the said deed so executed by said Lyman W. [428] Wakefield is hereto annexed and made a part hereof.

The said deed was duly recorded on the 7th day of February, 1899, in the office of said county recorder of Pima County.

Your petitioner further states that all of the said matters and things aforesaid, are records in the said case in this court, except the said certificate of sale, so executed by said sheriff, and the said deed, so executed by said sheriff, both of which, however, are records in the office of the county recorder of said Pima County, a copy of which said records is hereby annexed.

Your petitioner further represents that on the 24th day of April, 1907, the said Wilbur H. King did execute and acknowledge this deed conveying unto this petitioner, Joseph E. Wise, all of his right, title and interest in and to the said Baca Float or Location No. 3, and being the property so sold to said King at the said sheriff's sale aforesaid, which said deed was thereafter, and on the 24th day of May, 1907, duly recorded in the office of the county recorder of Santa Cruz County, State of Arizona, being the county within the limits of which the said Baca Float No. 3, is now situated the said Santa Cruz County having been created out of the Southern part of said Pima County, which said deed is of record in book 4

of Deeds at page 357 thereof, in the office of said county recorder, aforesaid; a copy of said deed is hereto annexed and made a part hereof, and petitioner, upon the hearing of this petition, will present for the consideration of the Court, the original deed, so recorded as aforesaid, and executed by said Wilbur H. King.

That under and by virtue of said deed your petitioner is the successor in interest of the said King, in and to the [429] property so sold by said sheriff, as aforesaid, and as successor in interest of the said Wilbur H. King, he further represents that no redemption has been made from said sale at any time, and that this petitioner, as the present owner of all of the property so sold by said sheriff at said sale and as the grantee and successor in interest of said Wilbur H. King, the purchaser at said sale, is entitled to have executed to him by the sheriff of Pima County, a deed which property recites the facts in regard to said attachment, judgment foreclosing attachment and sale, and which shall convey to him, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property so sold by the said sheriff at the said sale aforesaid, and so purchased by said Wilbur H. King, at said sale.

WHEREFORE your petitioner prays that John Nelson, the now duly elected, qualified and acting sheriff of said Pima County, State of Arizona, be the successor in the office of sheriff of the said Robert N. Leatherwood, who made said sale, be authorized and directed, as such sheriff, to execute, acknowledge

and deliver to your petitioner, a proper deed, conveying to your petitioner, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property aforesaid, levied upon and attached and foreclosed and sold at the said auction aforesaid, and for such other and further orders as may be meet in the premises.

J. E. WISE.

By SELIM M. FRANKLIN,

His Attorney.

State of Arizona,

County of Santa Cruz,—ss.

Joseph E. Wise being first duly sworn, says: that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the matters [430] therein stated are true of his own knowledge and belief, except as to matters therein stated on information and belief, and as to those matters, he believes the same to be true; and that all the matters stated therein are true in substance and in fact.

JOSEPH E. WISE.

Subscribed and sworn to before me this 26th day of September, 1914.

My commission expires February 13, 1918.

WM. A. JACKSTADT,

Notary Public. (Seal)

{ The sheriff's certificate of sale, the deed from Lyman W. Wakefield, sheriff, to Wilbur H. King, of date January 16, 1899, and the deed from Wilbur H. King to Joseph E. Wise, of date April 24, 1907,

referred to in the foregoing petition, being the same respectfully as Defendants Wise Exhibit 22, Defendants Wise Exhibit 23 and Defendants Wise Exhibit 24, are omitted.) [431]

Wednesday, October 1st, 1914.

The Superior Court of the State of Arizona, in and for Pima County convened pursuant to recess on Wednesday, September 1, 1914, at 10 o'clock A. M.

Hon. WM. F. COOPER, Presiding.

Present: JOHN NELSON, Sheriff of Pima County,
GEORGE O. HILZINGER, County Attorney,

HARRY C. NIXON, Court Reporter.

S. A. ELROD, Clerk.

I. NEUSTATTER, Bailiff.

Court was duly opened by the regular officers, according to law.

No. 2177.

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,

Defendant.

On the petition of Joseph E. Wise, filed herein, it is ordered that John Nelson, sheriff of Pima County, State of Arizona, be and he hereby is authorized and empowered to execute and acknowledge and deliver to Joseph E. Wise, his deed, as such sheriff, conveying to the said Joseph E. Wise, all of the property and all of the right, title and interest in and to the

property sold at sheriff's sale herein, by the said R. N. Leatherwood, as sheriff, under judgment and decree herein of the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, upon the said Joseph E. Wise paying to said John Nelson, the cost and expense of making and executing the said deed; and that a copy of this [432] order be recited in the deed so executed by said John Nelson, sheriff as aforesaid, as his authority for making and executing said deed.

IT IS ORDERED that the Superior Court of the State of Arizona in and for Pima County do now stand at rest.

WILLIAM F. COOPER,
Judge. [433]

*In the Superior Court of the State of Arizona, in and
for the County of Pima.*

No. 2177.

JOHN IRELAND and WILBUR H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,
Defendant.

Order Directing Sheriff to Execute New Deed.

Upon the reading and filing of the petition of Joseph E. Wise herein, and an inspection of the records of this court in the above-entitled case, and it appearing to the Court from the said records, that on the 13th day of March, 1893, the above-named plaintiffs filed their complaint in the District Court

of the First Judicial District of the Territory of Arizona, in and for the county of Pima, against the above-named David W. Bouldin, of which Court this Superior Court is the successor, in which suit, plaintiffs sought to recover judgment for certain sums of money against the said defendant; that thereafter, and on said 13th day of March, 1893, a summons was duly issued out of said court in said action, which summons was thereafter, and on the 22d day of April, 1893, returned and filed with the clerk of said court, showing the manner of the service thereof; that thereafter and on the 10th day of May, 1893, the said defendant David W. Bouldin did file his demurrer and answer in said court to the said complaint; that on the said 13th day of March, 1893, the said plaintiffs in said case did file affidavit and bond for writ of attachment, and on said day writ of attachment did issue out of said court in said case, directed to the sheriff of Pima [434] County, requiring him to attach so much of the property of said David W. Bouldin in said county of Pima, as shall be of value sufficient to make said sum of \$5000 with interest and costs.

That thereafter and on the 14th day of March, 1893, J. P. Scott, who then was the sheriff of said Pima County, did levy said attachment upon the following property of said defendant, to wit: "Location No. 3 (three) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States, approved June 21, 1860, entitled 'An Act to confirm certain private

land claims in New Mexico,' and found in volume 12 (Twelve) page 72 of the U. S. Statutes at Large, for further and better description of the above-described property see No. 41 page 597 and following pages Deeds of Real Estate in the Recorder's Office, in Tucson, County of Pima, Arizona Territory"; which said writ of attachment, with said return of levy made by said sheriff endorsed thereon, was filed with the said court on April 22, 1893.

That thereafter the said David W. Bouldin died, and one Leo Goldschmidt, as Administrator of the Estate of said David W. Bouldin deceased, was substituted as defendant in the said cause by the order of the said Court, as fully appears from the minutes of said court; that thereafter, and on the 2d day of May, 1895, the said District Court aforesaid, did render judgment in said case in favor of the said plaintiffs for the sum of \$8550, with interest and costs, and in said judgment did further adjudge and decree as follows:

“And it further appearing to the Court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied upon all of the right, title and interest of David W. Bouldin in and to the following described real estate, lying, being and situate in the county of Pima, Territory of Arizona, to wit: Location No. three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of [435] the United States approved June

21, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in volume 12 page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links, to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And it further appearing to the Court that said attachment lien should be foreclosed and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the sheriff of the county of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W.

Bouldin, in the above-described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.”

which said judgment was duly enrolled and filed as a record of said court on the said 2d day of May, 1895.

That thereafter an order of sale was duly issued out of said District Court under said judgment and decree, foreclosing said attachment lien, aforesaid, and was duly delivered to R. N. Leatherwood, the then sheriff of said Pima County, and that the said sheriff did, under and by virtue of the said execution or order of sale, sell all of the said property described in the said judgment aforesaid, at public sale, after giving due notice as required by law; that he did sell the same at public auction on the 31st day of July, 1895, to one Wilbur H. King for the sum of \$2000, as fully appears by the return of sale of said [436] sheriff annexed to the said order of sale, and duly filed in said court, on the 6th day of August, 1895.

That a certificate of sale was issued by the said sheriff to the said Wilbur H. King and a duplicate original thereof was duly filed by said sheriff with the county recorder of said Pima County.

That no redemption was made from said sale, and thereafter and on the 16th day of January, 1899, one Lyman W. Wakefield then sheriff of said Pima County, did execute to the said Wilbur H. King, the purchaser at said sheriff's sale, his deed, wherein the said Wakefield as sheriff, as aforesaid, did attempt to

convey the said property, so sold, as aforesaid, to the said purchaser, Wilbur H. King; but that by inadvertence or mistake, the said deed only purported to convey the right, title and interest which the said Leo Goldschmidt, administrator of the estate of said David W. Bouldin, deceased, had at the date of sale, and did not recite that the same conveyed the interest which had been attached, as aforesaid, and foreclosed, as aforesaid, under the said judgment of the said Court, aforesaid; and that the said deed contained other mistakes and discrepancies so that it is necessary that a new deed be executed by the present sheriff of said Pima County, as successor of the said sheriff who made said sale, so as to correct the errors in said deed executed by the said Lyman W. Wakefield, as aforesaid, which said deed so executed by said Wakefield, was duly recorded on the 7th day of February, 1899, in book 29 of Deeds at page 590 et seq. thereof in the office of the county recorder of said Pima County.

And it further appearing to the Court that on the 24th day of April, 1907, the said Wilbur H. King did execute, acknowledge and deliver his deed conveying unto said petitioner, Joseph E. Wise, all of his right, title and interest in and to the [437] said Baca Float or Location No. 3, and being the property so sold to said King at said sheriff's sale, aforesaid, which deed was thereafter and on the 24th day of May, 1907, recorded in the office of the county recorder of Santa Cruz County, State of Arizona, in book 4 of Deeds, at page 357 thereof, said Santa Cruz County being the county within the limits of which

the land and premises is now situated, and said Santa Cruz County being the county within the limits of which the land and premises is now situated, and said Santa Cruz County having been created out of the southern part of said Pima County, since the date of said sheriff's sale; and that the said Joseph E. Wise is the grantee and successor in interest of the said Wilbur H. King in and to the property so sold by said sheriff as aforesaid; that no redemption has been made from said sale at any time, and it further appearing that the said Joseph E. Wise, as the grantee and successor in interest of the said Wilbur H. King, the purchaser at said sale, is entitled to have executed to him by the sheriff of Pima County, as successor of the sheriff of Pima County, Territory of Arizona, who made said sale, a deed which properly conveys to him, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property, so foreclosed by the said judgment and decree of this Court, and so sold by the sheriff at the said sale aforesaid, and so purchased by said Wilbur H. King;

NOW, THEREFORE, it is hereby ordered that John Nelson, the present duly elected, acting and qualified sheriff of Pima County, State of Arizona, be, and he hereby is, authorized and empowered to execute and acknowledge and deliver to the said Joseph E. Wise his deed as such sheriff conveying to the said Joseph E. Wise all of the property so sold at the said [438] sheriff's sale, aforesaid, by the said R. N. Leatherwood, as sheriff under the said judgment and decree of the said District Court of

the First Judicial District of the Territory of Arizona, in and for the County of Pima, as aforesaid, upon the said Joseph E. Wise paying to said John Nelson, the cost and expense of making and executing the said deed; and that a copy of this order be recited in the deed so executed by said John Nelson, sheriff as aforesaid, as his authority for making and executing said deed.

Done in open court this 30th day of September, 1914.

WILLIAM F. COOPER,
Judge.

Filed this 30 day of Sept. 1914.

S. A. ELROD,
Clerk. [439]

State of Arizona,
County of Pima,—ss.

I, the undersigned, clerk of the Superior Court of the State of Arizona, in and for the county of Pima, and keeper of the records of said court, and also keeper of the records of the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, do hereby certify the foregoing to be a full, true and correct copy of the records and judicial proceedings of the said District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, and of the Superior Court of the State of Arizona, said last-named court being the successor of the said District Court, aforesaid, in that certain suit or action originally brought in the said District Court of the First Judicial District of the Territory of Arizona,

in and for the county of Pima, wherein John Ireland and Wilburn H. King were plaintiffs and David W. Bouldin was defendant, and in which suit or action, Leo Goldschmidt, as administrator of the estate of David W. Bouldin, deceased, was thereafter substituted as defendant, as the same appears from the records and files in my office.

I further certify that no copy of the minute entries made by the said District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, in said case, are set forth or contained in the foregoing copy of said records and proceedings, for the reason that none of the books and records containing the minute entries of the said District Court aforesaid, prior to the year 1900, are in my said office or in my possession, but the same are in the possession and subject to the control of the clerk of the District Court of the United States, in and for the District of Arizona; and for that reason no copies of said minute entries are set forth or contained in the foregoing copy and transcript, aforesaid [440]

IN WITNESS WHEREOF I have hereunto placed my hand and annexed the seal of the said Superior Court of the State of Arizona, in and for the county of Pima, at Tucson, Arizona, this 16th day of December, 1914.

[Seal]

S. A. ELROD,

Clerk of the Superior Court of the State of Arizona,
in and for the County of Pima.

[U. S. Int. Rev. Stamp, 10¢. Canceled.]

State of Arizona,
County of Pima,—ss.

I, the undersigned, presiding Judge of the Superior Court of the State of Arizona, in and for the county of Pima, do hereby certify that the foregoing attestation is in due form and by the proper officer.

IN WITNESS WHEREOF, I have hereunto set my hand at Tucson, Pima County, Arizona, this 16th day of December, 1914.

WILLIAM F. COOPER,
Presiding Judge of the Superior Court of the State
of Arizona, in and for the County of Pima.

[U. S. Int. Rev. Stamp, 10¢, Canceled.] [441]

Defendants Wise Exhibit 20.

*In the District Court of the United States in and for
the District of Arizona.*

JOHN IRELAND et al,

vs.

DAVID W. BOULDIN.

Comes now F. J. Heney, Esq., and suggests to the Court the death of David W. Bouldin, defendant herein and on motion of Francis J. Heney, Esq., Leo Goldschmidt, Esq., administrator of said David W. Bouldin, deceased is substituted for said David W. Bouldin and made defendant herein.

Dated April 25, 1895.

JOHN IRELAND et al.

vs.

DAVID W. BOULDIN.

This cause came on regularly for trial on the 2d day

of May, 1895, Francis J. Heney, Esq., appearing as counsel for plaintiffs and Leo Goldschmidt administrator of the estate of David W. Bouldin, deceased, appearing in his own proper person as the defendant in said cause by reason of the death of David W. Bouldin having been suggested to the Court and said Leo Goldschmidt as such administrator having been substituted as said defendant in said cause by order of the above-entitled court. A trial by jury having been expressly waived by the [442] respective parties, the cause was tried before the Court sitting without a jury, and witnesses were duly sworn and examined and documentary evidence was introduced and it having been clearly proven that the claim sued upon has been duly and properly filed with said administrator, Leo Goldschmidt, after he had duly qualified as such administrator, and during the pendency of this action and it further appearing that he had rejected the same, the cause was submitted to the Court for consideration and decision, and after due consideration thereon the Court finds all the issues herein for the plaintiffs and renders judgment for the said plaintiffs.

Dated May 2, 1895.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, clerk of the District Court of the United States for the District of Arizona, do hereby certify that the above and foregoing to be a true, perfect and complete copy of the minute entry appearing on page fifty (50) under date of April 25, 1895, and the minute entry on page seventy (70) un-

der date of May 2, 1895, of the minutes for the District Court of the First Judicial District in and for the county of Pima, Territory of Arizona, as the same appears from the original record thereof, remaining on file in my office.

WITNESS my hand and the seal of said court, affixed this 28th day of November, A. D., 1914.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Robert E. L. Webb,

Deputy. [443]

Defendants Wise Exhibit 21.

*In the Probate Court in and for the County of Pima,
Territory of Arizona.*

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

PETITION FOR LETTERS OF ADMINISTRATION.

To the Honorable, the Probate Court of the county of Pima, Territory of Arizona:

The Petition of Leo Goldschmidt of said county, respectfully shows:

That said David W. Bouldin died on or about the — day of January, 1895, in the county of Travis, State of Texas.

That said deceased at the time of his death was a resident of the county of Travis, State of Texas.

That said deceased left estate in the said county of Pima, Territory of Arizona, consisting of real property.

That the value and character of said property, so far as known to your applicant, are as follows, to wit:

An interest in private land claim or grant known as the Baca Grant No. 3 in said county of Pima.

That the estate and effects for or in respect of which letters of administration are hereby applied for, do not exceed the value of eight thousand five hundred dollars.

That the next of kin of said deceased and whom your petitioner . . . advised and believe . . . and therefore allege . . . to be the heirs at law of said deceased, are P. W. Bouldin, aged about 25 years, residing in Travis County, Texas, and — Bouldin, another son of D. W. Bouldin, who reside in said County and is over 21 years of age.

That due search and inquiry have been made to ascertain if said deceased left a will and testament but none have been [444] found and according to the best knowledge, information and belief of your petitioner, said deceased died intestate.

That your petitioner is advised and believes, he is entitled to letters of administration of said estate.

WHEREFORE, your petitioner prays that a day of court may be appointed for hearing this application, that due notice thereof be given by the clerk of said court by posting notice according to law and that upon said hearing and the proofs to be adduced, letters of administration of said estate may be issued to your petitioner.

And your petitioner will ever pray, etc.

(Signed) LEO GOLDSCHMIDT.

Dated April 9, 1895.

HENEY and FORD,
Attorneys for Petitioner.

[Endorsed]: Filed April 9, 1895. J. S. Wood, Ex-officio Clerk. [445]

*In the Probate Court of the County of Pima,
Territory of Arizona.*

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

Order Directing Posting of Notice of Application for Letters of Administration.

On reading and filing the petition of Leo Goldschmidt, praying for letters of administration of the estate of David W. Bouldin, deceased.

It is ordered that Saturday the 20th day of April, 1895, at 10 o'clock A. M. of that day, at the courtroom of this court, at the city of Tucson, in the county of Pima, be appointed for hearing said petition and that the clerk give notice thereof, by causing notices to be posted according to law.

J. S. WOOD,
Probate Judge.

Dated April 9th, 1895.

[Endorsed: Filed April 9, 1895: J. S. Wood, Ex-officio Clerk of the Probate Court. [446]

*In the Probate Court, County of Pima, Territory of
Arizona.*

In the Matter of the Estate of DAVID W. BOUL-
DIN, Deceased.

**Notice of Application for Letters of Administration
for Posting.**

Notice is hereby given that Leo Goldschmidt has filed with the clerk of this court, a petition praying for letters of administration of the estate of David W. Bouldin, deceased, and that Saturday, the 20th day of April, 1895, at 10 o'clock A. M. of said day, at the courtroom of said court in the city of Tucson, county of Pima, has been set for hearing said petition, when and where any person *interest* may appear and show cause why the petition should not be granted.

Dated April 9, 1895.

J. S. WOOD,

Ex-officio Clerk of the Probate Court.

Territory of Arizona,
County of Pima,—ss.

I do hereby certify that I posted three notices of which the within is a true copy, one on the bulletin board at the front entrance of the courthouse, one on the bulletin board in the corner of Maiden Lane and Court Street, and one on the bulletin board in the Probate Courtroom, all of said notices were posted in the City of Tucson, in said County of Pima, on the 9th day of April, 1895.

J. S. WOOD,

Probate Judge.

[Endorsed]: Filed April 20th, 1895. J. S. Wood,
Ex-officio Clerk of the Probate Court. [447]

KNOW ALL MEN BY THESE PRESENTS:
That we, Leo Goldschmidt, principal, and Ben Heney
and Adolph Goldschmidt, as sureties, are held and
firmly bound to the Territory of Arizona, in the sum
of Three Hundred Dollars (\$300) lawful money of
the United States of America, to be paid to the said
Territory of Arizona, for which payment well and
truly to be made, we bind ourselves, our and each of
our heirs, executors and administrators, jointly and
severally, firmly by these presents:

Sealed with our seals and dated this 20th day of
April, 1895.

The condition of the above obligation is such that
whereas by an order of the Probate Court in and for
the county of Pima, aforesaid, duly made and en-
tered on the 20th day of April, 1895, the above-
bounden Leo Goldschmidt was appointed adminis-
trator of David W. Bouldin, deceased, and letters of
administration were directed to be issued to him,
upon his executing a bond according to law in said
sum of Three Hundred Dollars (\$300).

NOW, THEREFORE, if the said Leo Gold-
schmidt as such administrator shall faithfully exe-
cute the duties of the trust, according to law, then
this obligation to be void, otherwise to remain in full
force and effect.

Signed sealed and delivered in the presence of:

LEO GOLDSCHMIDT. (Seal)

BEN HENEY. (Seal)

ADOLF GOLDSCHMIDT. (Seal)

Territory of Arizona,
County of Pima,—ss.

Ben Heney and Adolf Goldschmidt, the sureties whose names are subscribed in the above undertaking, being severally duly sworn each for himself says, that he is a resident and freeholder in said Territory of Arizona, and is worth the sum in the said undertaking specified as the penalty thereof, over [448] and above all his just debts and liabilities, exclusive of property exempt from execution.

(Signed) BEN HENEY.

(Signed) ADOLF GOLDSCHMIDT.

Subscribed and sworn to before me this 20th day of April, 1895.

[Seal]

T. K. MILLER,
Notary Public, Pima County, Arizona.

[Endorsed]: Approved this 20th day of April, 1895.

J. S. WOOD,
Probate Judge.

Filed April 20, 1895. J. S. Wood, Ex-officio Clerk of the Probate Court. [449]

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

Order Appointing Administrat—

The petition of Leo Goldschmidt, praying for letters of administration of the estate of David W.

Bouldin, deceased, coming on regularly to be heard; and due proof having been made to the satisfaction of this Court that the clerk had given notice in all respects according to law; and all and singular the law and evidence by the Court understood and fully considered; whereupon it is by the Court here adjudged and decreed that the said David W. Bouldin died on the — day of January, 1895, intestate, in the county of Travis, State of Texas; that he was a resident of the said county of Travis at the time of his death and that he left estate in the county of Pima, and within the jurisdiction of this court.

It is Ordered that letters of administration of the estate of the said David W. Bouldin, deceased, issue to the said petitioner Leo Goldschmidt, upon his taking the oath and filing a bond according to law in the sum of Three Hundred (\$300) Dollars.

Dated April 20th, 1895.

J. S. WOOD,
Probate Judge.

[Endorsed]: Filed April 20th, 1895. J. S. Wood
Ex-officio Clerk of the Probate Court. [450]

*In the Probate Court of Pima County, Territory of
Arizona.*

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

Letters of Administration.

Territory of Arizona,
County of Pima,—ss.

Leo Goldschmidt is hereby appointed adminis-

trator of the Estate of David W. Bouldin, deceased.

Witness John S. Wood, Judge and Ex-officio Clerk of the Probate Court of the county of Pima, Territory of Arizona, with the seal thereof affixed, the 20th day of April, 1895.

By order of the Court.

[Seal]

J. S. WOOD,

Ex-officio Clerk of the Probate Court.

Territory of Arizona,
County of Pima,—ss.

I, Leo Goldschmidt, do solemnly swear that I will support the constitution of the United States and the laws of this Territory, and that I will faithfully perform, according to law, the duties of administrator of the estate of David Bouldin, deceased.

LEO GOLDSCHMIDT.

Subscribed and sworn to before me the 20th day of April, 1895.

J. S. WOOD,

Ex-officio Clerk of the Probate Court.

[Endorsed]: Filed April 20, 1895. J. S. Wood,
Clerk of the Probate Court. [451]

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

Order Appointing Appraisers.

Letters of Administration having been issued herein to Leo Goldschmidt, and application being

made for the appointment of appraisers to appraise the estate of said David W. Bouldin, deceased.

It is Ordered that Alfred J. Goldschmidt, S. G. Rowe, George Shand, three disinterested and capable persons be and they are hereby appointed such appraisers.

Dated April 20th, 1895.

J. S. WOOD,
Probate Judge.

[Endorsed]: Filed April 20th, 1895. J. S. Wood,
Ex-officio Clerk of the Probate Court. [452]

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

I, John S. Wood, Judge, county clerk of the county of and ex-officio clerk of the Probate Court of Pima County, do hereby certify that Alfred J. Goldschmidt, S. G. Rowe and George Shand were duly appointed appraisers of the estate of the above-named deceased by order of the said Court duly entered and recorded on the 20th day of April, 1895.

Witness my hand and the seal of said court this 20th day of April, 1895.

[Seal]

J. S. WOOD,
Ex-officio Clerk of the Probate Court.

Territory of Arizona,
County of Pima,—ss.

Alfred J. Goldschmidt, S. G. Rowe and George Shand, duly appointed appraisers of the estate of

David W. Bouldin, deceased, being duly sworn each for himself says: That he will truly, honestly and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

ALFRED J. GOLDSCHMIDT,
S. G. ROWE.

Subscribed and sworn to before me this 20th day of April, 1895.

[Seal]

T. K. MILLER,
Notary Public, Ex-officio Clerk. [453]

Territory of Arizona,
County of Pima,—ss.

Oath of Executor of Administrator.

Leo Goldschmidt, the administrator of David W. Bouldin, deceased, being duly sworn says that the annexed inventory contains a true statement of all the estate of the said deceased, which has come to the knowledge and possession of this affiant and particularly of all money belonging to the said deceased, and of all just claims of the said deceased against the said affiant.

LEO GOLDSCHMIDT.

Subscribed and sworn to before me this 20th day of April, 1895.

[Seal]

J. S. WOOD,
Probate Judge.

Estate of DAVID W. BOULDIN, Deceased, to
———, Appraisers, Dr.

To compensation for service in appraising said estate; items as follows:

One day service at \$3 per day each. \$6

Territory of Arizona,
County of Pima,—ss.

The appraisers above named being duly sworn each for himself says that the foregoing bill of items is correct and just and that the services have been duly rendered as therein set forth.

ALFRED J. GOLDSCHMIDT,
S. G. ROWE.

Subscribed and sworn to before me this 20th day of April, 1895.

[Seal]

T. K. MILLER,
Notary Public. [454]

An undivided interest in a certain tract of land situated in the county of Pima, Territory of Arizona, known and called the Baca Float No. 3, the estate mentioned in the foregoing inventory is —— property.

We, the undersigned, duly appointed appraisers of the estate of David W. Bouldin, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us and that we appraise the same at the sum of Two Hundred and Fifty Dollars (\$250).

ALFRED J. GOLDSCHMIDT,
Appraiser.

S. G. ROWE,

Appraiser.

Dated April 20th, 1895.

[Endorsed]: Filed April 20th, 1895. J. S. Wood,
Ex-officio Clerk of the Probate Court.

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of DAVID W. BOULDIN, Deceased.

Order Directing that Notice be Given to Creditors.

It is hereby ordered that notice be given by the administrator of the estate of said David W. Bouldin, deceased, by publication for four weeks in the Arizona Daily Citizen, a newspaper printed in Pima County, to the creditors of and persons having claims against said deceased to present them to said Leo Goldschmidt with the proper vouchers within four months after the first publication of this notice.

Dated April 20th, 1895.

J. S. WOOD,
Probate Judge.

[Endorsed]: Filed April 20, 1895. J. S. Wood,
Ex-officio Clerk of the Probate Court. [455]

State of Arizona,
County of Pima,—ss.

I, the undersigned, clerk of the Superior Court of the State of Arizona, in and for the county of Pima, and keeper of the records of said court, and also keeper of the records of the Probate Court of Pima County, Territory of Arizona, of which said court the said Superior Court aforesaid is the successor, do hereby certify the foregoing to be a full, true and correct copy of the records and judicial proceedings of the said Probate Court of Pima County, Territory of Arizona, and of the Superior Court of the State of

Arizona, in and for the county of Pima, in that certain matter or proceeding originally brought and instituted in the said Probate Court of the county of Pima, Territory of Arizona, in the matter of the estate of David W. Bouldin, deceased, and which said matter or proceeding is still pending before the said Superior Court of the State of Arizona, in and for said county of Pima.

IN WITNESS WHEREOF, I have hereunto placed my hand and annexed the seal of the said Superior Court of the State of Arizona, in and for the county of Pima, at Tucson, Arizona, this 23d day of January, 1915.

S. A. ELROD,

Clerk of the Superior Court of the State of Arizona,
in and for the County of Pima.

[U. S. Int. Rev. Stamps 10c. Cancelled.]

State of Arizona,
County of Pima,—ss.

I, the undersigned, presiding Judge of the Superior Court of the State of Arizona, in and for the county of Pima, do hereby certify that the foregoing attestation is in due form and by the proper officer.

IN WITNESS WHEREOF, I have hereunto set my hand at Tucson, Pima County, Arizona, this 23d day of January, 1915.

WILLIAM F. COOPER,

Judge of the Superior Court of the State of Arizona,
in and for the County of Pima. [456]

Defendants Wise Exhibit 22.

*In the District Court of the First Judicial District
of the Territory of Arizona, in and for the
County of Pima.*

JOHN IRELAND and WILBUR H. KING,
Plaintiff,

vs.

LEO GOLDSCHMIDT, Administrator of the Es-
tate of David W. Bouldin, Deceased,
Defendant.

**SHERIFF'S CERTIFICATE OF SALE OF
REAL ESTATE ON EXECUTION.**

I, Robt. N. Leatherwood, sheriff of the county of Pima, do hereby certify that by virtue of an execution in the above-entitled action, tested the third day of July, 1895, by which I was commanded to take the amount of eight thousand, five hundred and fifty (\$8,550) and thirty-four and forty-five one hundredths (\$34.45), dollars, costs of suit, lawful money of the United States, to satisfy the judgment in said action, with costs and interests thereon, out of the personal property of David W. Bouldin (deceased), Leo Goldschmidt, administrator of the defendant in said action, and if sufficient personal property cannot be found, then out of the real property belonging to the said defendant on 31st day of July, 1895, or at any time thereafter, as by the said writ, reference being hereunto had, more fully appears; I levied on and this day sold at public auction, according to the statute in such cases made and provided, to Wil-

bur H. King, who was the highest and best bidder, for the sum of Two Thousand Dollars (\$2,000) lawful money of the United States, which was the whole price bid by him for the same, the real estate particularly described as follows, to wit:

Location No. 3, being one of five tracts of land, selected and located by virtue of and in accordance with the provisions of the Sixth section of an [457] act of Congress, of the United States, approved June 21st, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in volume twelve, page 72 of the *United States at Large*, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction North forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, containing ninety-nine thousand, two hundred and eight-nine acres and thirty-nine hundredths of an acre more or less.

and the said real estate was sold in one parcel and that the price of each distinct lot and parcel was as follows: Two Thousand (\$2,000) Dollars, and that the said real estate is subject to redemption in lawful

money of the United States, pursuant to the statute in such cases made and provided.

Given under my hand this 31st day of July, 1895.

ROBT. N. LEATHERWOOD,

Sheriff.

By W. H. Taylor,

Under-sheriff.

Filed Aug. 6th, 1895.

State of Arizona,
County of Pima,—ss.

I, the undersigned, county recorder of the county of Pima, State of Arizona, and the keeper of the records of said county, do hereby certify the foregoing to be a full, true and correct copy of the record of the original instrument of which the same purports to be a copy, as the same is of record in my office and that the original of said instrument was duly recorded in my office on the 6th day of August, 1895.

In Witness Whereof I have hereunto placed my hand and affixed my official seal as such county recorder, this 27 day of November, 1914.

P. E. HOWELL,

County Recorder of Pima County, State of Arizona.

[458]

Defendants Wise Exhibit 23.

THIS INDENTURE, made the sixteenth day of January in the year of our Lord one thousand eight hundred and ninety-nine between Lyman W. Wakefield, Sheriff of the County of Pima, Territory of Arizona, the party of the first part, and Wilbur H. King, of Sulphur Springs Texas, the party of the

second part, Whereas by virtue of a writ of execution issued out of and under the seal of the District Court of the First Judicial District of the Territory of Arizona, tested the third day of July, 1895, upon a judgment recovered in the said court on the second day of May, 1895, in favor of John Ireland and Wilber H. King, and against Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, to the said sheriff directed and delivered commanding him that out of the personal property of the said judgment debtor, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in his county he should cause to be made certain moneys in the said writ specified and if sufficient personal property of the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, could not be found then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, on the thirty-first day of July, 1895, or at any time afterwards. And Whereas, because sufficient personal property of the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, could not be found whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did in obedience to said command levy on, take and seize all the right, title, interest and claim which the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, so had to the land, tenements,

real estate and premises hereinafter particularly set forth and described [459] with the appurtenances, and did on the thirty-first day of July, 1895, sell all the right, title, interest and claim of said judgment debtor Leo Goldschmidt, administrator, of in and to the said premises, at public auction, in front of the courthouse, in the city of Tucson, in said Pima County of the Territory of Arizona, between the hours of nine in the morning and five in the afternoon of that day, namely, at 12 o'clock, M., after having first given due notice of the time and place of such sale by publication according to law, at which sale all the right, title, interest and claim of the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, in and to the said premises were struck off and sold to Wilber H. King, one of the said parties of the second part, for the sum of two thousand dollars lawful money of the United States of America, the said Wilber H. King, one of the parties of the second part being the highest bidder and that being the highest sum bid for the same. Whereupon the said sheriff after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to Wilber H. King, the said parties of the second part, such certificate of said sale as is by law directed to be given and a duplicate of such certificate was duly filed by the said sheriff in the office of the recorder of the said county of Pima. And Whereas, six months after said sale having expired without any redemption of the said premises having been made.

Now this indenture witnesseth that the said Lyman

W. Wakefield, the sheriff, aforesaid, by virtue of the said writ and in pursuance of the statute in such case made and provided for and in consideration of the said sum of money to him in hand paid as aforesaid, by Wilber H. King, one of the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed and by these presents does grant, bargain, sell, [460] convey and confirm unto Wilber H. King, one of the said parties of the second part, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the said thirty-first day of July, 1895, or at any time afterwards, or now have in and to all that certain lot, piece or parcel of land, situated, lying and being in the said county of Pima, Territory of Arizona, and bounded and particularly described as follows, to wit: Location Number three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States, approved June 21st, 1860, entitled, an act to confirm certain private land claims in New Mexico, and found in volume twelve, page 72 of the *United States at Large*, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west

twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning. Containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. To Have and to Hold the said premises with the appurtenances unto the said party, his heirs and assigns forever, as fully and absolutely as the said sheriff can, may or ought to, by virtue of said writ and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same. [461]

In Witness Whereof, the said sheriff the said party of the first part has hereunto set his hand and seal the day and year first above written.

LYMAN W. WAKEFIELD, (Seal)
Sheriff of the said County of Pima, Territory of
Arizona.

Signed, sealed and delivered in presence of,
FRANCIS M. HARTMAN,
CLINDON D. HOOVER.

[\$2.00 U. S. Int. Rev. Stamp.]

Territory of Arizona,
County of Pima,—ss.

On this sixteenth day of January, A. D., Eighteen hundred and ninety-nine, personally appeared before me, the within named Lyman W. Wakefield, sheriff

been originally brought against the said David W. Bouldin, in his lifetime, it was, among other things, ordered, adjudged and decreed that a certain attachment lien as the same existed on the 14th day of March, 1893, levied upon all of the right, title and interest of said David W. Bouldin, in and to the real property in said judgment or decree and hereinafter described, be foreclosed, and that an order of sale be issued by the clerk of said court under the seal of said court, directed to the sheriff of the county of Pima, Territory of Arizona, directing him to seize and sell, as under execution, for the purpose of foreclosing said attachment lien, the right, title and interest of said David W. Bouldin, in and to the property described in said judgment or decree, and hereinafter described, as the same existed on the 14th day of March, 1893, or so much thereof as would be necessary to satisfy the said judgment, with costs and costs of sale, at public auction, in the manner required by law and according to the course and practice of said court;

And Whereas, an order of sale was duly issued under said judgment and decree aforesaid, out of said District Court, [463] aforesaid, and directed to the said sheriff of Pima County, and was duly delivered to R. N. Leatherwood, the then sheriff of said Pima County, for execution; and Whereas, the said sheriff did, at the hour of 12 o'clock M., on the 31st day of July, 1895, after due public notice had been given, as required by the laws of the Territory of Arizona, and the course and practice of said District Court, duly sell at public auction, in the said county

of Pima, agreeably to the said judgment and decree and order of sale aforesaid, and the provisions of law, the premises in the said judgment mentioned, at which sale the premises in the said judgment or decree, and hereinafter described, were fairly struck off to Wilbur H. King, for the sum of \$2,000, he being the highest bidder and that being the highest sum bid for the same, which consideration was thereupon paid to the said sheriff by said Wilbur H. King;

And Whereas, said sheriff thereupon made and issued the usual certificate, in duplicate, of the said sale, in due form of law, and delivered one thereof to the said purchaser, and caused the other to be filed in the office of the county recorder in said county of Pima; and

Whereas, more than six months had elapsed since the date of said sale and no redemption had been made of the premises, so sold as aforesaid, by or on behalf of said judgment debtor, or by or on behalf of any other person whatsoever.

And Whereas, thereafter and on the 16th day of January, 1899, Lyman W. Wakefield, the then sheriff of the said county of Pima, Territory of Arizona, did execute, acknowledge and deliver to the said Wilbur H. King, as the purchaser at said sale a deed, in which he purported to convey to said Wilbur H. King, the said property so sold, as aforesaid, and which said deed was thereafter recorded in the office of the county recorder of said Pima County, in book 29 of Deeds, at pages 59 et seq. thereof; and Whereas, thereafter and on or about the 24th day of [464]

April, 1907, the said Wilbur H. King did assign and convey all of his interest in the said property aforesaid, to Joseph E. Wise, the party of the 2d part hereto, as fully appears from the deed signed, executed and acknowledged by said Wilbur H. King of said date, and recorded in the office of the county recorder of Santa Cruz County, State of Arizona, in book 4 Deeds of Real Estate, at page 357 et seq. thereof; and whereas, the said deed, so executed by said Lyman W. Wakefield, sheriff, as aforesaid, is alleged to be defective in divers and sundry parts, and the said Joseph E. Wise has made application to the Superior Court of the State of Arizona, in the said case aforesaid, for an order, authorizing and directing the party of the first part hereto, as sheriff of said Pima County, and as successor in office of the said R. N. Leatherwood, as sheriff, as aforesaid, to execute to him, the said Joseph E. Wise, as the successor in interest and grantee of the said Wilbur H. King, a new and proper deed upon the said sale aforesaid; and Whereas, the said Superior Court of the State of Arizona, in and for the county of Pima, did, upon said application, make and sign its order in the said matter, a certified copy of which order has been delivered to the party of the first part hereto, as sheriff, which said order of said Court is in words and figures following, to wit:

*In the Superior Court of the State of Arizona, in and
for the County of Pima.*

No. 2177.

JOHN IRELAND and WILBURN H. KING,
Plaintiffs,

vs.

DAVID W. BOULDIN,

Defendant. [465]

Order Directing Sheriff to Execute New Deed.

Upon the reading and filing of the petition of Joseph E. Wise herein, and an inspection of the records in this court in the above-entitled case, and it appearing to the Court from the said records, that on the 13th day of March, 1893, the above-named plaintiffs filed their complaint in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, against the above-named David W. Bouldin, of which court this Superior is the successor, in which suit, plaintiffs sought to recover judgment for certain sums of money against the said defendant; that thereafter, and on said 13th day of March, 1893, a summons was duly issued out of said court in said action, which summons was thereafter, and on the 22d day of April, 1893, returned and filed with the clerk of said court, showing the manner of the service thereof; that thereafter and on the 10th day of May, 1893, the said defendant David W. Bouldin did file his demurrer and answer in said court to the said complaint; that on the said 13th day of March, 1893, the said plaintiffs in said case did file affidavit and bond for writ

of attachment, and on said day a writ of attachment did issue out of said court in said case, directed to the sheriff of Pima County, requiring him to attach so much of the property of said David W. Bouldin in said county of Pima, as shall be of value sufficient to make said sum of \$5000., with interest and costs.

That thereafter and on the 14th day of March, 1893, J. P. Scott, who then was the sheriff of said Pima County, did levy said attachment upon the following property of said defendant, to wit: 'Location No. 3 (three) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the Sixth section of an act of Congress of the United States, approved June 21, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in Volume 12 (Twelve) page 73 of the United States Statutes at Large, for further and better description of the above described property see No. 41, page 597 and following pages Deeds of Real Estate in the Recorder's Office of Tucson, County of Pima, Arizona Territory'; which said writ of attachment with said return of levy made by said sheriff endorsed thereon, was filed with the said court on April 22, 1893.

That thereafter the said David W. Bouldin died, and one Leo Goldschmidt, as administrator of the estate of said David W. Bouldin, deceased, was substituted as defendant in the said cause, by the order of the said Court, as fully appears from the minutes of said court; and thereafter, and on the 2d day of May, 1895, the said District Court aforesaid, did render judgment in said case in favor of the said plain-

tiffs, for the sum of \$8,550, with interest and costs, and in said judgment did further adjudge and decree as follows:

‘And it further appearing to the Court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied on all of the right, title and interest of David W. Bouldin in and to the following described [466] real estate, lying being and situate in the County of Pima, Territory of Arizona, to wit: Location No. three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21, 1860, entitled “An Act to confirm certain private land claims in New Mexico,” and found in volume 12 page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and

eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And it further appearing to the Court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, therefore, it is ordered, decreed and adjudged, that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the sheriff of the county of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment *lien*, the right, title and interest of said David W. Bouldin in the above-described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.'

which said judgment was duly enrolled and filed as a record of said court on the said 2d day of May, 1895.

That thereafter an order of sale was duly issued out of said District Court under said judgment and decree, foreclosing said attachment lien, aforesaid, and was duly delivered to R. N. Leatherwood, the then sheriff of said Pima County, and that the said sheriff did, under and by virtue of the said execution or order of sale, sell all of the said property described in the said judgment aforesaid, at public

sale, after giving due notice as required by law; that he did sell the same at public auction on the 31st day of July, 1895, to one Wilbur H. King, for the sum of \$2,000, as fully appears by the return of sale of said sheriff, annexed to the said order of sale, and duly filed in said court, on the 6th day of August, 1895.

That a certificate of sale was issued by the said sheriff to the said Wilbur H. King and a duplicate original thereof [467] was duly filed by said sheriff with the county recorder of said Pima County.

That no redemption was made from said sale, and thereafter and on the 16th day of January, 1899, one Lyman W. Wakefield, then sheriff of said Pima County, did execute to the said Wilbur H. King, the purchaser of said sheriff's sale, his deed, wherein, the said Wakefield as sheriff, as aforesaid, did attempt to convey the said property, so sold as aforesaid, to the said purchaser, Wilbur H. King; but that by inadvertence or mistake, the said deed only purported to convey the right, title and interest which the said Leo Goldschmidt, administrator of the estate of said David W. Bouldin, deceased, had at the date of sale, and did not recite that the same conveyed the interest which had been attached as aforesaid, and foreclosed as aforesaid, under the said judgment of the said Court aforesaid; and that the said deed contained other mistakes and discrepancies so that it is necessary that a new deed be executed by the present sheriff of said Pima County, as a successor of the said sheriff who made said sale, so

as to correct the errors in said deed executed by said Lyman W. Wakefield, as aforesaid, which said deed so executed by said Wakefield, was duly recorded on the 7th day of February, 1899, in book 29 of Deeds at page 590 *et seq.* thereof, in the office of the county recorder of said Pima County.

And it further appearing to the Court that on the 24th day of April, 1907, the said Wilbur H. King did execute, acknowledge and deliver his deed conveying unto said petitioner, Joseph E. Wise, all of his right, title and interest in and to the said Baca Float or Location No. 3, and being the property so sold to said King at said sheriff's sale aforesaid, which deed was thereafter and on the 24th day of May, 1907, recorded in the office of the county recorder of Santa Cruz County, State of Arizona, in book 4 of Deeds, at page 357 thereof, said Santa Cruz County being the county within the limits of which the land and premises is now situated, and said Santa Cruz County having been created out of the southern part of said Pima County, since the date of said sheriff's sale; and that the said Joseph E. Wise is the grantee and successor in interest of the said Wilbur H. King in and to the property so sold by said sheriff as aforesaid; that no redemption has been made from said sale, at anytime, and it further appearing that the said Joseph E. Wise, as the grantee and successor in interest of said Wilbur H. King, the purchaser at said sale, is entitled to have executed to him by the sheriff of Pima County, as successor of the sheriff of Pima County, Territory of Arizona, who made said sale, a deed which prop-

erly conveys to him, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property so foreclosed by the said judgment and decree of this Court and so sold by the said sheriff at the said sale aforesaid, and so purchased by said Wilbur H. King;

NOW, THEREFORE, it is hereby ordered that John Nelson, the present duly elected, acting and qualified sheriff of Pima County, State of Arizona, be and he hereby is, authorized and empowered to execute and acknowledge and deliver to the said Joseph E. Wise, his deed as such sheriff conveying to the said Joseph W. Wise, all of the property and all of the right, title and interest in and to the property so sold at the said sheriff's sale aforesaid, by the said R. N. Leatherwood, [468] as sheriff under the said judgment and decree of the said District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, as aforesaid, upon the said Joseph E. Wise paying to said John Nelson the cost and expense of making and executing the said deed; and that a copy of this order be recited in the deed so executed by said John Nelson, sheriff as aforesaid, as his authority for making and executing said deed.

Done in open court this 29th day of September, 1914.

WILLIAM F. COOPER,

Judge.

NOW, THEREFORE, this indenture witnesseth: That the party of the first part, the said sheriff aforesaid, in order to carry into effect the sale so

made by the said R. N. Leatherwood, sheriff, as aforesaid, in pursuance of said judgment or decree and order of sale aforesaid, and in order to carry into effect the said order of the said Superior Court of the State of Arizona in and for Pima County, aforesaid, and also in consideration of the premises and of the sum of money so bid and paid by the said purchaser, the said Wilbur H. King, to the said R. N. Leatherwood, as aforesaid, upon said sale, has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell and convey unto the said Joseph E. Wise, as the grantee and successor in interest of the said Wilbur H. King, the party of the second part hereto, and to his heirs and assigns forever, all of the right, title, and interest of the said David W. Bouldin, as the same existed on the 14th day of March, 1893, and all the right, title and interest which the said David W. Bouldin had, on the said 14th day of March, 1893, in and to the following described real estate, lying, being and situate in the then county of Pima, Territory of Arizona, now county of Santa Cruz, in the State of Arizona, the said county of Santa Cruz having been created out of the said Pima County by act of the Legislature of the Territory of Arizona, since the said 14th day of March, 1893, to wit:

“Location No. three (3), being one of five tracts of land selected and located by virtue of [469] and in accordance with the provisions of the sixth section of an act of Congress of the United States, approved June 21, 1860, entitled ‘An Act to confirm certain private land claims

in New Mexico,' and found in volume 12, page 72 of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and thirty-four links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the rents, issues and profits thereof.

To Have and to Hold, all and singular the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the party of the first part to these presents, as sheriff as aforesaid, has hereunto set his hand and seal, the day and year first above written.

JOHN NELSON,

Sheriff of the County of Pima, State of Arizona.

Signed and sealed in the presence of

State of Arizona,
County of Pima,—ss.

On this 5th day of October, 1914, personally appeared before me, a notary public, in and for said county of Pima the above-named John Nelson, sheriff of the county of Pima, State of Arizona, known to me to be the person described in and whose name is subscribed to the within instrument as such sheriff, and he, the said John Nelson, acknowledged to me that [470] he, as such sheriff of said Pima County, executed the same for the purposes and considerations therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the said county of Pima, State of Arizona, on this 5th day of October, 1914.

[Seal]

S. A. ELROD,
Clerk Superior Court.

Filed and recorded at request of J. E. Wise October 26, A. D., 1914, at 9:45 A. M.

PHIL HEROLD,
County Recorder.

State of Arizona,
County of Santa Cruz,—ss.

I, the undersigned, county recorder of the county of Santa Cruz, State of Arizona, and the keeper of the records of said county do hereby certify the foregoing to be a full true and correct copy of the record of the original instrument of which the same purports to be a copy, as the same is of record in my office in book 8, Deeds of Real Estate, at pages 29 to

36 inc., and that the original of said instrument was duly recorded in my office in the said book and page aforesaid on the 28 day of October, 1914.

In Witness Whereof, I have hereunto placed my hand and affixed by official seal as such county recorder this day of December, 1914.

PHIL HEROLD,

County Recorder of Santa Cruz County, State of Arizona.

[U. S. Int. Rev. Stamps 10¢. Canceled.]

State of Arizona,
County of Santa Cruz,—ss.

I, the undersigned, presiding Judge of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the foregoing attestation is in due form and by the proper officer. [471]

In Witness Whereof, I have hereunto set my hand at Nogales, Santa Cruz County, Arizona, this 4th day of December, 1914.

W. A. O'CONNOR,

Presiding Judge of the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

[U. S. Ins. Rev. Stamps 10¢. Cancelled.] [472]

State of Arizona,
County of Santa Cruz,—ss.

I, the undersigned, clerk of the Superior Court of the State of Arizona, in and for the county of Santa Cruz, do hereby certify that the Hon. W. A. O'Connor is the presiding Judge of the said Superior Court aforesaid, and is duly commissioned and qualified as such.

In Witness Whereof I have hereunto placed my hand and the seal of the said Superior Court aforesaid, this 4th day of December, 1914.

[Seal] EDW. L. MIX,
Clerk of the Superior Court of the State of Arizona,
in and for the County of Pima.

[U. S. Ins. Rev. Stamps 10¢. Cancelled.] [472]

[**Order Approving Statement of Evidence, etc.**]

District of Arizona,
County of Pima,—ss.

The foregoing statement of the evidence and proceedings in the above-entitled case having heretofore, and on the 9th day of November, 1915, been lodged in the office of the clerk of this court by appellants Joseph E. Wise and Lucia J. Wise, for the examination of the other parties, and all the other parties hereto, or their respective solicitors, having been duly notified by the said Joseph E. Wise and Lucia J. Wise of the time and place when said appellants Wise would ask the Court or Judge to approve the said statement, the time so named in such notice being more than ten days after the service of said notice, as fully appears by the return of notice on file herein, and all objections and amendments proposed having been duly considered and the said statement, as hereinabove set forth, being found by the judge hereof to be true, complete and properly prepared, the same, on this 22d day of December, 1915, is hereby approved, and the same shall be filed in the office of the clerk of this court and become a part of the record in this case, for the purposes of the appeal.

WM. H. SAWTELLE,

Judge. [473]

Decree.

Filed and entered November 1, 1915.

This cause came on to be further heard at this term on the bill, answers, answers in the nature of cross-bills, replies, replications, and proofs, for the quieting of title and removal of cloud, and as argued by counsel, and thereupon, upon consideration thereof, it is by the Court.

ORDERED, ADJUDGED AND DECREED, as follows:

First. That the absolute title in fee simple to all that certain tract or parcel of land situate, lying and being in the county of Santa Cruz (formerly county of Pima) State of Arizona, and particularly described as follows:

Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains, forty-four links; thence east twelve miles, thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and forty-four links to the place of beginning; according to the survey of Philip Contzen filed in the office of the Surveyor General of Arizona and in the offices of the Register and Receiver of the General Land Office for Arizona on or about December 14, 1914; said tract of land being known as Baca Float No. 3, and

being the third of the series of locations made on behalf of the heirs of Luis Maria Baca under the provisions of the Sixth Section of the act of Congress of June 21, 1860 (12 U. S. Stat. 71).

was, at the time of the commencement of this action and still is, vested and is hereby quieted in the plaintiffs to the extent of an undivided eighteen-nineteenths of the south half, and in the defendant, Jennie N. Bouldin, to the extent of an undivided eighteen thirty-eighths of the north half, and in the defendant, David W. Bouldin, to the extent of an undivided eighteen seventy-sixths of the north half, and in the defendant Helen Lee Bouldin, to the extent of an undivided eighteen seventy-sixths of the north half, and in the defendant, Joseph [474] E. Wise, to the extent of an undivided one thirty-eighth of the whole, and in the defendant, Margaret W. Wise, to the extent of an undivided one thirty-eighth of the whole of said tract.

Second. That the respective titles of the plaintiffs and of the defendants, Jennie N. Bouldin, David W. Bouldin, Helen Lee Bouldin, Joseph E. Wise and Margaret W. Wise, as above adjudicated, be and the same hereby are severally quieted in them severally against the respective claims of the respective parties to this action.

Third. That none of the defendants, Santa Cruz Development Company, Lucia J. Wise, Jesse H. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, Eldredge I. Hurt or W. G. Rifenburg has any right, title, interest, claim or demand in or to, or incumbrance upon, the tract or

parcel of land hereinbefore particularly described, or any part or portion thereof.

Fourth. That each of the parties to this action, and all persons claiming under them or any of them, be forever barred from and estopped against asserting any right, title or interest in or incumbrances upon said tract or parcel of land or any part or portion thereof adverse to any of the titles as hereinbefore adjudicated.

Fifth. That the various recorded instruments purporting to inure to the benefit of any of the parties to this action against, or in hostility to, or as an encumbrance upon, any of the titles as hereinbefore adjudicated, be and the same hereby are severally removed as clouds upon the respective titles as hereinbefore adjudicated.

Sixth. That until the said tract or parcel of land was segregated from the public domain of the United States on or about December 14, 1914, no adverse possession or statutory [475] prescription could commence or be initiated by any party to this action.

Seventh. That the temporary injunction, heretofore granted against Joseph E. Wise, as modified, is hereby made permanent as to the south one-half of the tract or parcel of land hereinbefore described; and dissolved as to the north half thereof.

Eighth. That a certified copy of this decree be filed and recorded in the office of the recorder of Santa Cruz County, State of Arizona.

Ninth. That the plaintiffs have judgment for their costs as taxable disbursements against the defendant Santa Cruz Development Company in the

sum of one hundred fifty dollars (\$150), and against the defendants Jennie N. Bouldin, David W. Bouldin, Helen Lee Bouldin, in the sum of one hundred dollars (\$100), and against the defendants Joseph E. Wise and Lucia J. Wise in the sum of one hundred dollars (\$100); and that the plaintiffs recover their costs against Joseph E. Wise in the sum of forty and seventy-seven hundredths \$(40.77) dollars, in the injunction proceedings.

Tenth. That any party to the action may apply at the foot of this decree for such other and further relief as may be proper.

WILLIAM H. SAWTELLE,
District Judge. [476]

Minute Entries of the Court, of Date November 1, 1915, Relative to Notice and Allowance of the Appeals of the Respective Parties.

Now comes the above-named plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., into open court at the time of the rendition and signing of the decree in the above-entitled case, and feeling themselves aggrieved by that portion of said decree that recognizes the title of the defendants Joseph E. Wise and Margaret W. Wise, to an undivided one thirty-eighth each of the tract or parcel of land, the title to which is sought to be quieted in said action in the plaintiffs, and also that portion of said decree which does not recognize and quiet the title of the plaintiffs in and to the whole of the south half of said tract or parcel of land, and the failure and refusal of said Court in not recognizing and quieting the appeal from such portions of said decree

to the Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said portions of said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals. And now, to wit, on November 1, 1915, it is ordered that the appeal be allowed, as prayed for, and that the bond of said plaintiffs on appeal be fixed at the sum of One Thousand Dollars (\$1,000). . . .

Now come the above-named defendants James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin in open court, at the time of the rendition and signing of the decree in the above-entitled cause, and conceiving themselves aggrieved by that portion of said decree that recognizes the title of the defendants Joseph E. Wise and Margaret W. Wise to [477] an undivided one thirty-eighth each of the tract or parcel of land, the title to which is sought to be quieted in said action, and also that portion of said decree which does not recognize and quiet the title of the said defendants in and to the whole of the north half of said tract or parcel of land, and the failure of said Court in not recognizing and quieting the whole of said north half of said tract of land in the said defendants, do hereby appeal from such portions of said decree to the Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said portions of said decree were made, duly authenticated, may

be sent to said Circuit Court of Appeals. And now, to wit, on November 1st, 1915, it is ordered that the appeal be allowed, as prayed for, and that the bond of said defendants on appeal be fixed at the sum of One Thousand Dollars (\$1,000). . . .

Upon the rendering of the decree herein on this date, the defendants Joseph E. Wise and Lucia J. Wise, by Selim M. Franklin, Esquire, their solicitor and attorney, gave notice in open court, of their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said judgment and decree of this Court and at the same time did file herein their assignments of error.

The Court did then order that the bond on appeal of said appellants be fixed at the sum of One Thousand Dollars (\$1,000). The said appellants Joseph E. Wise and Lucia J. Wise did thereupon file their bond on appeal, in accordance with said order, which bond was thereupon approved by the Judge of this Court.

Thereupon the Court ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the [478] decree this day rendered herein, be, and the same is hereby allowed to the said defendants Joseph E. Wise and Lucia J. Wise, and that a certified transcript be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, as provided by law, and the rules of said Court.

Thereupon the defendants (intervenors) M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt, by John D.

MacKay, Esquire, their solicitor and counsel, gave notice in open court that they, and each of them, joined in the said appeal of said defendants Joseph E. Wise and Lucia J. Wise, and said joinder was allowed by the Court.

And thereupon the defendants Jesse H. Wise and Margaret W. Wise, by James R. Dunseath, Esquire, their solicitor and attorney, gave notice in open court that they did not join in said appeal, or in any appeal whatsoever, and that they did not intend to appeal from the decree herein, as said decree was in their favor for all the relief they had asked for in their pleadings. . . .

The above-named defendant Santa Cruz Development Company conceiving itself aggrieved by the decree entered herein, in open court, this first day of November, 1915, appears by its solicitor in open court at the time of the signing and rendition of said decree and gives notice of appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit and asks for fourteen days' time within which to present its assignment of errors and same is allowed by the Court as prayed for. [479]

*In the United States District Court for the District
of Arizona.*

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-

DIN, JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE H. WISE,
DAVID W. BOULDIN, HELEN LEE
BOULDIN, M. I. CARPENTER, PAT-
RICK C. IRELAND, IRELAND GRAVES,
ANNA R. WILCOX, ELDREDGE I.
HURT and W. G. RIFENBURG,

Defendants.

**Assignments of Error of Joseph E. Wise and Lucia
J. Wise.**

And now, on this 1st day of November, A. D. 1915, come the defendants Joseph E. Wise and Lucia J. Wise, by their solicitor Selim M. Franklin, Esquire, and say that the judgment and decree entered in the above cause on the first day of November, 1915, is erroneous and unjust to said defendants Joseph E. Wise and Lucia J. Wise, and to the defendants M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt, and that in the record and proceedings in said cause there is manifest error committed by the United States District Court, in and for the District of Arizona, in this:

I.

That said Court erred in adjudging and decreeing that the plaintiffs Cornelius C. Watts and Dabney C. T. Davis, Jr., [480] were at the commencement of this action and still are vested with absolute title in fee simple to an undivided eighteen-nineteenths (18/19) interest in the south half ($\frac{1}{2}$) of the tract or parcel of land in said judgment and decree described, and in quieting their title thereto;

and said judgment and decree in that regard is contrary to the evidence in this case, for each and all of the following reasons:

1. That the evidence in this case conclusively shows and proves that said plaintiffs did not own in fee simple, and never did own in fee simple, or otherwise, an undivided 18/19 interest in the said south half of said lands and premises, or an undivided 18/19 interest in any part thereof.

2. That the evidence in this case conclusively shows and proves that said plaintiffs, and each of them, claim and deraign their title in and to the said tract or parcel of land, and to the south half thereof, under and by virtue of a certain deed, dated on the 8th day of February, 1907, executed to them by S. A. M. Syme and the devisees of Alexander F. Mathews, deceased, and the executors of the will of said Alexander F. Mathews, deceased, and the evidence further shows that neither the said S. A. M. Syme or the said devisees or executors, or the said Alexander F. Mathews, deceased, in his lifetime, ever owned or was seized in fee of an undivided 18/19 interest in the said tract or parcel of land, or the south half of said tract or parcel of land, or any part thereof.

3. That the evidence in this case conclusively shows and proves that the said S. A. M. Syme deraigned and claimed his title to said tract of land under and by virtue of a certain deed executed to him by John C. Robinson, of date the 30th day of April, 1896, and that the said deed to said Syme does not convey, or purport to convey unto him the

said south half of said lands and premises, or any part thereof, [481] or any interest therein, and that the said Syme did not have any right, title or interest whatsoever in or to said south half of said tract or parcel of land, or in or to any part thereof, at the time he executed his deed of date February 8, 1907, or at any other time.

4. That the evidence in this case conclusively shows and proves that Alexander F. Mathews in his lifetime, and his devisees and executors after his death, deraigned and claimed their title to said tract or parcel of land under and by virtue of the following deeds which were executed to said Alexander F. Mathews in his lifetime, to wit:

- (1) Deed from John C. Robinson to Alexander F. Mathews, dated September 22, 1893.
- (2) Deed from John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, dated September 22, 1893.
- (3) Deed from John W. Cameron to Alexander F. Mathews, dated September 25, 1893.
- (4) Deed from James Eldridge to Alexander F. Mathews, dated September 22, 1893.
- (5) Deed from Charles A. Eldredge to Alexander F. Mathews, dated December 22, 1893.
- (6) Deed from Powhatan Bouldin and wife and James E. Bouldin to Alexander F. Mathews, dated February 7, 1894.
- (7) Deed from John Ireland and Wilbur H. King to Alexander F. Mathews, dated February 23, 1894.

And the evidence in this case further conclusively

shows and proves that none of the grantors in said last-mentioned deeds, or any of them, owned or was seized in fee of an undivided 18/19 interest, or any other interest, in or to the said south half of said tract or parcel of land, at the time of the execution of their respective deeds; and each and all of the said deeds above enumerated, under which the said plaintiffs claim and deraign their title, do not and did not [482] convey, or purport to convey, to the respective grantees therein mentioned, the whole or any part of, or any interest in or to, the said south half of the lands and premises described in the judgment and decree herein, but purported to describe, and did describe, an entirely different piece, tract or parcel of land; therefore the said District Court erred in adjudging and decreeing that plaintiffs were the owners in fee simple of an undivided 18/19 interest or any interest whatsoever, in the south half of said tract or parcel of land described in said judgment and decree, and in quieting their title thereto.

5. That the evidence in this case further conclusively shows and proves that each and all of the grantors and mesne grantors under whom the plaintiffs claim or deraign their title to the south half of the tract or parcel of land mentioned and described in the judgment and decree herein, or to any part thereof, or to any interest therein, (except John Ireland and Wilbur H. King, who executed the deed of February 23, 1894, hereinbefore enumerated,) deraigned and claimed their title under John C. Robinson; that the said John C. Robinson did not own in fee simple, and never did own in fee simple or other-

wise, an undivided 18/19 interest, or any interest whatsoever, in or to the south half of the tract or parcel of land described in said decree, or to any part thereof; that the said John C. Robinson did not convey, or purport to convey, by any of the deeds executed by him, the south half or any part of the tract or parcel of land described in the judgment and decree herein; but purported to convey and did convey an entirely different tract of land, as clearly appears from the description in each and all of said deeds.

6. That the evidence in this case conclusively shows and proves that the said John Ireland and Wilbur H. King [483] on the 23rd day of February, 1894, the date when they executed to Alexander F. Mathews their deed hereinbefore referred to, did own in fee simple a small undivided interest in the tract or parcel of land described in the judgment and decree herein; but the deed so executed by them aforesaid, did not quitclaim or convey, or purport to quitclaim or convey, the south half, or any interest whatsoever in the south half of the tract, or parcel of land described in the judgment and decree herein, but did describe and purport to describe, and did convey and purport to convey, an entirely different tract or parcel of land.

7. That the evidence in this case conclusively shows and proves that the said John C. Robinson, under whom the plaintiffs deraign all of their title (except the interest they claim by mesne conveyances under the deed from Ireland and King aforesaid) deraigned his title under and by virtue of a certain

deed executed to him by Christopher E. Hawley, of date May 5, 1884; and that the said Christopher E. Hawley deraigned and claimed his title under and by virtue of a certain deed of quitclaim, dated January 8, 1870, executed to him by John S. Watts, and that the tract or parcel of land described in said quitclaim deed of John S. Watts to Christopher E. Hawley did not describe, or purport to describe, the tract or parcel of land described in the decree herein, but an entirely different tract or parcel of land, and the said John S. Watts did not, under and by virtue of said deed, remise, release and quitclaim, or in any manner convey to said Christopher E. Hawley, the parcel or tract of land described in the judgment and decree herein, or any part thereof or any interest therein. [484]

II.

That the Court erred in adjudging and decreeing that the absolute title in fee simple to the north half of that certain tract or parcel of land described in said judgment and decree was, at the time of the commencement of this action and still is, vested to the extent of an undivided $18/38$ interest in Jennie N. Bouldin; and $18/76$ interest in David W. Bouldin, and an $18/76$ interest in Helen Lee Bouldin, and in adjudging that any of said Bouldins had any interest whatsoever in said tract of land or any part thereof, and in quieting their title thereto, and said judgment and decree in that regard is contrary to the evidence in this case, for each and all of the following reasons:

1. That the evidence in this case conclusively

shows and proves that the said Bouldins did not own in fee simple, and that none of them did ever own in fee simple or otherwise, any interest whatsoever in the said north half of said tract or parcel of land, or any part thereof.

2. That the evidence in this case conclusively shows and proves that the said Bouldins above named, claim and deraign their title to the north half of the tract or parcel of land aforesaid, under and by virtue of certain deeds and mesne conveyances from Powhatan Bouldin and James E. Bouldin, and that the said Powhatan Bouldin and James E. Bouldin claimed and deraigned their title to said north half of said tract or parcel of land under and by virtue of a certain deed dated November 19, 1892, executed to them by John C. Robinson; that the said deed so executed by said Robinson to the said Powhatan and James E. Bouldin, did not convey, or purport to convey to the said grantees the north half of said tract or parcel of land described in the judgment and decree herein, or any part thereof; but did convey and purport to convey, and did describe an entirely different piece, parcel or tract of land, and [485] that the said John C. Robinson himself, did not own in fee, or otherwise, at the date he executed his deed aforesaid, to said Powhatan and James E. Bouldin, or at any other time whatsoever, the north half of the lands and premises described in the judgment and decree, or any part or parcel thereof.

III.

That the Court erred in adjudging and decreeing that the absolute title in fee simple was, at the com-

mencement of this action, and still is, vested to the extent of an 18/19 interest in plaintiffs as to the south half, and 18/19 interest in said Bouldins as to the north half, of the lands and premises described in the judgment and decree herein, and in quieting their respective titles thereto, for the following reasons:

1. That the evidence in this case conclusively shows and proves that plaintiffs and said defendants Bouldins claim and deraign whatever title they have under and by virtue of mesne conveyances from Christopher E. Hawley, and that the said Christopher E. Hawley deraigns his title thereto under that certain quitclaim deed of date January 8, 1870, executed by John S. Watts to said Hawley, as aforesaid; and that the said John S. Watts did not, at the date of his deed aforesaid, to said Hawley, own in fee simple or otherwise, an undivided 18/19 interest in the tract or parcel of land described in said judgment and decree, and therefore, the said Christopher E. Hawley did not acquire under the said quitclaim deed from John S. Watts, or in any other manner, or by any other deed, an undivided 18/19 interest in the said tract of land described in the decree, or an 18/19 interest in or to any part thereof.

2. That the evidence in this case conclusively shows and proves that Luis Maria Baca had nineteen children who were his heirs, and that the tract of land described in the decree [486] herein was granted by the Government of the United States to all the heirs of said Baca; that on the 8th day of January, 1870, when said John S. Watts, executed

his quitclaim deed to said Hawley, the said Watts had acquired the interest of thirteen of the said heirs of said Baca, and no more, and on said day when said Watts executed said deed to Hawley, the said Watts owned an undivided 13/19 interest and no more, in the said tract of land described in the decree herein, and which tract of land had been so granted by the Act of Congress of the United States to the heirs of said Baca; therefore, the said Hawley did not and could not acquire from said Watts under the deed of said Watts aforesaid, more than an undivided 13/19 interest in the said tract of land described in the decree, even if that particular tract of land had been described in the deed which said Watts executed to Hawley; and therefore, said Hawley, in no event, ever became the owner in fee simple or otherwise, of more than an undivided 13/19 interest in the lands remised, released and quit-claimed to him by the said deed of Watts, and in no event did or could the plaintiffs, or any or all of the said Bouldins who deraign their title under said Hawley as aforesaid, acquire more than an undivided 13/19 interest in the tract or parcel of land described in the decree; and the decree of said District Court, adjudging that plaintiffs were or are the owners in fee of an undivided 18/19 interest in the south half, and said defendants Bouldin are the owners in fee of an undivided 18/19 interest in the north half of the tract or parcel of land described in the decree, is contrary to the evidence in this case. [487]

IV.

The Court erred in overruling the objection of

the defendants Joseph E. Wise and Lucia J. Wise to the offer and introduction by the plaintiffs of the deed executed to John S. Watts, by certain of the heirs of Luis Maria Baca, insofar as said deed pretended to be executed or to be a deed of conveyance of the following heirs of said Luis Maria Baca, to wit: (1) Felipe Baca, (2) Domingo Baca, (3) Jesus Baca y Lucero 1st, (4) Jesus Baca y Lucero 2d, (5) Josefa Baca y Sanchez, for the reason (1) That the said deed upon its face, does not purport to be the deed of said Felipe Baca; that name is not mentioned as a grantor in the body of the deed; (2) That said deed is signed "Domingo Baca," but the body of the deed recites that Franco Baca is the purchaser of the interest of Domingo Baca, and the face of the deed shows that said Domingo Baca, when he signed the deed, had parted with his interest in the lands conveyed; and said deed is not signed by Franco Baca, his grantee; (3) The deed is signed also Jesus Ma. Baca, purchaser of the interest of Jesus Baca y Lucero. Now the deed in the body of it recites that Jesus Maria Cabeza de Baca is the owner by purchase of the interest of Jesus Baca y Lucero the first. It is signed by him as the purchaser of the interest of Lucero the Second, but there were two of those Luceros, the first and the second. Therefore, being the purchaser of the interest of Jesus Baca y Lucero the second it does not convey the interest of himself as the purchaser of Lucero the First. (4) The deed is also signed "Tomas C. Baca, attorney in fact for the heirs of Jesus Baca y Lucero the First." In the body of the deed Jesus

Baca y Lucero the First is not recited as a party; his heirs are not recited as parties. Tomas C. Baca is not recited as their attorney in fact. In other words, in the body of the deed Jesus Baca y Lucero the First is not a party to it by himself or his heirs or attorney in fact, or at all. Therefore, as to him the deed is signed by one who [488] purports to be the attorney in fact of the heirs of Jesus Baca y Lucero the first, and the heirs of Jesus Baca Lucero the first do not pretend to be parties to the instrument at all. (5) The deed is also signed "Tomas C. Baca, attorney for the heirs of Josefa Baca y Sanchez." Now the deed recites that Josefa Baca y Sanchez is a party of the first part—a grantor. The deed recites that Josefa Baca y Sanchez conveys but the deed is not signed by her; it is not signed by her attorney in fact. But it is signed by Tomas C. Baca as attorney in fact for her heirs, and of course, does not convey any of her interest.

V.

The Court erred, after it had admitted in evidence, subject to the objections of plaintiffs, a duly exemplified copy of the record of a deed executed by John Watts, in his own proper person and as the attorney in fact for his brother J. Howe Watts, and the other grantors, dated September 30, 1884, said deed being executed to David W. Bouldin, and conveying to him an undivided two-thirds interest in the lands in dispute in this action, said exemplified copy being "Defendants Wise Exhibit 16" and "Defendants Wise Exhibit 17," in sustaining the said objection for the reason that said exemplified copies

of the record of said deed had been theretofore duly admitted in evidence; the same were material in the deraignment of title of the said Joseph E. Wise, and were proper and competent evidence in said case.

VI.

That the Court erred in sustaining the objections of counsel for plaintiffs to the introduction in evidence by the defendant Joseph E. Wise, of a duly authenticated copy of the record of a deed dated September 30th, 1884, executed by John Watts in his own proper person, and by Elizabeth A. Watts, widow of John S. Watts, [489] and J. Howe Watts and other heirs of John S. Watts, deceased, by said John Watts as their attorney in fact, wherein they did convey unto said Bouldin an undivided two-thirds interest of all their right, title and interest in the tract or parcel of land described in the decree herein, said instrument so offered, being marked in the record as "Defendant Joseph E. Wise Exhibit 16"; and said Court did also err in sustaining the objection of counsel for plaintiffs to the introduction in evidence by said defendant Wise of another duly authenticated copy of the record of said deed, being described in the record herein as "Defendant Joseph E. Wise Exhibit 17"; the objections of said plaintiffs to the introduction in evidence of each of said instruments being upon the ground that the same were, and each of them are, immaterial, in that, as they asserted, John S. Watts, under whom the said widow and heirs mentioned in said deed deraign title, had nothing to convey, had no right, title or interest in or to the property therein described,

neither said widow, nor any of said heirs executing said deed to Bouldin, had any right, title or interest in said lands or premises, and for that reason said Bouldin acquired nothing by said deed, and the same was inadmissible as against the plaintiffs; that the Court erred in its said ruling in sustaining the said objection for the reason that the said John S. Watts, at the time of his death, was seized in fee of the full title to all of the tract or parcel of land described in the decree herein, and his widow and heirs, who executed the deed aforesaid, to Bouldin, inherited all of said tract of land and premises from said John S. Watts, he having died intestate; and the said widow and heirs, at the time of the execution of said deed to said Bouldin, were the owners in fee of the full title to all of the tract or parcel of land described in the judgment and decree herein; that defendant Joseph E. Wise, and the defendants M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt, deraign their title by certain mesne conveyances from the said David W. Bouldin and therefore, [490] the said deed so executed to said David W. Bouldin was material and competent and relevant evidence to the issues in this case; and each of the certified or duly authenticated copies thereof aforesaid, were admissible in evidence as part of the proof of the title of the said defendant Joseph E. Wise, to the tract or parcel of land in dispute in this action, and described in the judgment and decree herein.

VII.

That the Court erred in not permitting the said

Joseph E. Wise to introduce in evidence the said deed, or duly certified copies of the record of the said deed executed by the heirs and widow of John S. Watts to David W. Bouldin, for the reason that the original deed was duly executed, acknowledged and recorded by the persons, or their duly authorized attorney in fact, who purported so to execute the same, and the said deed did convey to, and did vest title in the grantee therein named, to wit, David W. Bouldin, an undivided two-thirds interest in the tract or parcel of land in dispute in this action, being the tract or parcel of land described in the judgment or decree herein; that the said grantors were, at the time of the execution of said deed, vested with the absolute title in fee simple, to all of the said tract or parcel of land in said judgment and decree described, and their said deed aforesaid did vest an undivided two-thirds interest in said tract or parcel of land in the said David W. Bouldin; and the defendants Joseph E. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt, deraign their title by certain mesne conveyances, and by a certain proceedings in court, under the said David W. Bouldin.

VIII.

The Court erred in sustaining the objection of plaintiffs and defendants Bouldin to the introduction in evidence by the [491] defendant Joseph E. Wise of a duly exemplified and authenticated copy of the judgment, record and proceedings in that certain case or suit in the District Court of the First Judicial District of the Territory of Ari-

zona, in and for the county of Pima, entitled John Ireland and Wilbur H. King, plaintiffs, vs. David W. Bouldin, defendant, and thereafter being in the Superior Court of the State of Arizona, in and for the county of Pima, as successor of the said District Court, said exemplified copy so offered in evidence being marked, in the present case, "Defendant Wise Exhibit 19," which said judgment in said case amongst other things adjudged and decreed the foreclosure of an attachment lien upon all the right, title and interest which said David W. Bouldin had on the 14th day of March, 1893, in the tract or parcel of land in dispute in the present action, and directing a sale of the said lands by the sheriff of said Pima County, to satisfy said lien and to satisfy the judgment then rendered; and which said record and proceedings further showed, in pursuance of said judgment and decree, the sheriff of said Pima county did duly sell, under the order of said Court, all of the right, title and interest which the said David W. Bouldin had in said tract of land aforesaid, to Wilbur H. King, on or about the 31st day of July, 1895; that said King paid to the sheriff the amount of his bid and that a certificate of sale was duly issued to him by said sheriff; that no redemption was made from said sale; that thereafter, the said sale was duly confirmed and a deed directed to be executed by the court having jurisdiction in said case to Joseph E. Wise, as the successor in interest and grantee of said Wilbur H. King, and fully showing that all the right, title and interest which said David W. Bouldin had in the said tract of land was duly sold under an order

of sale or execution issued under said judgment to said Wilbur H. King, and that, as there was no redemption therefrom the court ordered a deed to be executed to Wise, as the assignee and grantee of said King. That the said evidence was material for the further reason that on [492] the said 14th day of March, 1893, when the writ of attachment in said suit was levied upon said tract of land, the said David W. Bouldin did own an undivided interest therein, equal to nearly two thirds thereof; and the said judgment, execution and all of the proceedings in said case were material for the further reason that upon the same was predicated the deed which the sheriff did execute in pursuance of the orders of said Court to the purchaser at said sale, and to his assignee and grantee; and that the said judgment was duly made and rendered by a court having jurisdiction of the subject matter and of the parties, and the sale made thereunder did vest in the said Joseph E. Wise, as the assignee and grantee of said King, the purchaser at said sale, all of the right, title and interest which the said David W. Bouldin had in the said tract of land on the day when said writ of attachment was levied, to wit, March 14, 1893.

Counsel for defendants Bouldin also objected to the introduction in evidence by Joseph E. Wise, of the said judgment, record and proceedings, on the ground that the Court rendering said judgment had no jurisdiction, and that the judgment was void, that the levy was void, and that the confirmation of the sale was void, and generally, that no right, title or interest was conveyed under the sale made by said sheriff, or under the deed executed under any

order of the Court, or by any sheriff, or other officer. These objections were also sustained by the Court, and the defendant Joseph E. Wise also assigns as error said ruling of the Court so sustaining said objections of counsel for defendants Bouldin, for the reason that the Court rendering said judgment had jurisdiction and the title conveyed by the sheriff was a good title and the said judgment, record and proceedings were competent and material evidence as hereinbefore more fully set forth.

The said record and proceedings were admitted in evidence subject to the objections of plaintiffs and defendants Bouldin, and [493] thereafter, and after defendant Joseph E. Wise had rested his case, the Court sustained the objections of plaintiffs and defendants Bouldin to the introduction in evidence of said record, proceedings and judgment, to which ruling of the Court due exception was taken.

IX.

The Court erred in sustaining the motion of plaintiffs to strike out all of the testimony of the defendant Joseph E. Wise as to his possession of any part of the tract or parcel of land in dispute, and particularly his testimony as to his adverse possession, and claim under adverse possession and prescription, to the following piece of land situate within the limits of the tract or parcel of land described in the decree, to wit, the east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the west half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirty-five (35), township twenty-two (22), south, range 13 east, Gila and Salt River Meridian, containing one hundred

and sixty (160) acres; also as to a certain tract containing five (5) acres, known as the Magee Millsite, for which United States patent as a millsite had been issued by the Government of the United States; the objection being upon the ground that the same was incompetent and immaterial because the Statute of Limitations of the State of Arizona, and heretofore Territory of Arizona, did not apply to said tract of land as the same had not been officially segregated from the public domain until December, 1913.

The testimony of said Wise was substantially that prior to 1907, when he obtained his first interest to the tract of land in dispute, under deed from Wilbur H. King, he had, for a period of more than ten years continuously prior to the year 1907, and at the time of his obtaining said deed from said King, been in the peaceable, adverse possession of the tract of land above described, containing 160 acres; that he had fenced the same up and [494] took possession thereof in 1889, and has been in possession ever since; that prior thereto he had made a homestead filing on said tract of land and in December, 1908, had made final proof on the same before the United States Land office, but nothing further had been done; that he claimed said tract of land adversely to everybody except the Government of the United States, and had possessed and was cultivating it from 1889 up to date; that he had been in possession of the said Magee patented millsite, containing five acres, and had fenced the same and been in such possession, claiming the same adversely, for more than

ten years prior to the year 1907, and ever since has claimed the same adversely and by virtue of peaceable possession thereof, and under a patent issued therefor by the Government of the United States; that the said patent covers the ruins of the Hacienda de Santa Rita, and that he had been in possession thereof ever since 1884.

That under said testimony the claims of plaintiffs, and all other parties to this action, as against said defendant Joseph E. Wise, were barred by the Statute of Limitations of the State of Arizona in regard to adverse possession, and the Court erred therefore, in striking out said testimony.

X.

The Court erred in sustaining the motion of the plaintiffs and of the defendants Bouldin, to strike out the testimony and admissions as to the testimony of the defendant Lucia J. Wise, the grounds of said motion being that said evidence was immaterial and that no title or rights by adverse possession alone could be obtained as against any of the parties hereto as to the tract of land aforesaid, until December, 1914.

The facts which *all* counsel in open court stipulated should be considered as the testimony of said Lucia J. Wise, were, that her mother Mary E. Sykes, in the year 1900 took possession of [495] that certain forty-acre tract of land described in the last amended answer herein, as the land claimed adversely by said Lucia J. Wise, and being within the limits of the tract of land described in the decree herein; that said Mary E. Sykes erected monuments

and lived thereon at a house thereon, and cultivated and used and claimed it continuously from the year 1900 until the date of her death, in the year 1913; that she had made an application for a homestead entry thereon, under the United States public land laws, in her lifetime, which was rejected; that defendant Lucia J. Wise is her daughter and the Executrix of the last will and testament of said Mary E. Sykes, and as such executrix and heir she took possession of the said tract of land upon the death of her mother, and ever since has lived upon the same and has claimed the same as such executrix and heir, and that at all times the said Mary E. Sykes in her lifetime, and the said Lucia J. Wise as heir and executrix since the death of said Mary E. Sykes, have been in the peaceable, adverse possession of said forty acres of land, using and cultivating the same, and claiming the same adversely to all persons except as against the United States.

The Court erred in sustaining said motion for the reason that, under the Statutes of the State of Arizona, the action of plaintiffs and all of the defendants, against the said Lucia J. Wise, to quiet title to the said forty acres, was barred, and the said Lucia J. Wise, as heir and executrix of her mother, had absolute title in fee to said forty acres of land by virtue of adverse possession and prescription under the Statutes of Arizona.

XI.

The Court erred in denying the motion of the defendants Joseph E. Wise and Lucia J. Wise to strike out Plaintiffs' Exhibits "U," "V," "W," "X,"

“Y,” “Z,” “AA,” “BB,” “CC,” “DD,” “EE”; said exhibits being the following deeds to wit: Deed from John C. Robinson to Alexander F. Mathews, dated September 22, 1893, being Plaintiffs’ Exhibit ‘U’; [496] Deed from John C. Robinson to S. A. M. Syme, dated April 30, 1896, being Plaintiffs’ Exhibit ‘V’; Deed from Syme and Mathews to Watts and David, Trustees, dated February 8, 1907, being Plaintiffs’ Exhibit ‘W’; Deed from Powhatan Bouldin and wife and James E. Bouldin to John C. Robinson, dated November 12, 1892, being Plaintiffs’ Exhibit ‘X’; Deed from Wilbur H. King and John Ireland to Alexander F. Mathews, dated February 23, 1894, being Plaintiffs’ Exhibit ‘Y’; Deed from John W. Cameron and A. T. Belknap to Alexander F. Mathews, dated September 22, 1893, being Plaintiffs’ Exhibit ‘Z’; Deed from Cameron to Mathews, dated September 25, 1893, being Plaintiffs’ Exhibit ‘AA’; Deed from Charles A. Eldredge to Alexander F. Mathews, dated December 22, 1893, being Plaintiffs’ Exhibit ‘BB’; Deed from James Eldredge to Alexander F. Mathews, dated September 22, 1893, being Plaintiffs’ Exhibit ‘CC’; Declaration of Trust from Cameron to Robinson, et al., dated November 28, 1892, being Plaintiffs’ Exhibit ‘DD’; and Deed from Powhatan Bouldin and others to Mathews, dated February 7, 1894, and being Plaintiffs’ Exhibit ‘EE.’ Said motion being made on the grounds that each and all of said deeds and instruments were irrelevant, immaterial and incompetent in that they describe a different tract of land than the tract of land in dispute in this case,

and did not tend to prove that plaintiffs have any title to the tract or parcel of land in dispute herein, for the reason that none of said deeds did purport to describe or convey the tract or parcel of land in dispute in this action, and described in the decree, or any part thereof, and are utterly immaterial.

XII.

The Court erred in overruling the objection of counsel for Joseph E. Wise and Lucia J. Wise, and counsel for the defendant Santa Cruz Development Company, to the introduction in evidence by the defendants Bouldin, of each and all of the following deeds and instruments in writing, to wit: [497]

1. Deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1884, being Defendants Bouldin Exhibit 1.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894, being Defendants Bouldin Exhibit 2.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendant Bouldins' Exhibit No. 3.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendant Bouldins' Exhibit No. 4.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendant Bouldins' Exhibit 5.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracy, dated April 16, 1900, being Defendant Bouldins' Exhibit 6.

7. Deed from D. B. Gracey to James E. Bouldin,

dated June 15, 1904, being Defendant Bouldins' Exhibit 7.

The introduction of which said deeds was objected to on the ground that the same were immaterial and did not cover the property in controversy, for the reason that none of said grantors or parties mentioned in the said deeds and certificate of sale had any interest whatsoever in the tract or parcel of land described in the decree, and none of the said deeds or said certificate of sale purported to convey the property in controversy, or the tract of land described in the decree, or any interest therein.

XIII.

The Court erred in permitting plaintiffs to introduce in evidence, over the objections of the defendants Wise and Santa Cruz Development Company, an instrument in writing executed by John S. Watts to Wm. Wrightson, dated March 2, 1863, and being Plaintiffs' Exhibit L, for the reason that the same was irrelevant, incompetent and immaterial; that plaintiffs deraign no title under said instrument; [498] and the said instrument could not be used to vary the description in the deed subsequently executed by said John S. Watts to Christopher E. Hawley and there was no evidence showing that Christopher Hawley claimed or deraigned any interest or title under the said title bond aforesaid.

XIV.

The Court erred in denying the motion of the defendant Joseph E. Wise, for leave to file a duly exemplified copy of the affidavit of Prudencio and of the affidavit of Luis A. C. Baca, signed by each of

them respectively, more than thirty years prior to the commencement of this case, and being about in the year 1879, the originals of which affidavits are on file as a part of the records of the District Court in and for the Territory of New Mexico; for the reason that the said affidavits are ancient documents, signed by the said Prudencio and the said Luis A. C. Baca; that each of them was dead at the time the suit was commenced; that said Prudencio Baca was a son of Luis Maria Baca, and the said affidavit signed by him was a statement of all of the children of his father, Luis Maria Baca, and of the descendants of such children; and that said affidavit showed that Antonio Baca was the son of Luis Maria Baca; that said Antonio Baca died leaving a son by the name of Manuel Baca; that he died leaving two children, to wit, a son, Jose Baca, and a daughter, Prudencio Baca; that the evidence in this case discloses that neither Joseph E. Wise nor his counsel, knew of the existence of the said affidavits, so signed by Prudencio Baca and Luis A. C. Baca, when this case was tried; but the record further discloses that counsel for plaintiffs had in their possession a duly certified copy of such affidavit signed by Prudencio Baca, and when, during the trial of this case, they were requested to produce the same by the counsel for Joseph E. Wise, they refused to do so, and the said Joseph E. Wise, since the trial but [499] before entry of judgment in this case, did himself obtain from the District Court of New Mexico a certified copy of the said affidavit and did present the same to the lower court, with his motion

to file the same as evidence in this case, and that the lower court erred in refusing his motion allowing him to file the same as an exhibit and evidence in this case.

XV.

The Court erred in overruling the objection of the defendants Joseph E. Wise and Lucia J. Wise to the introduction in evidence by the defendant Santa Cruz Development Company of a certified copy of the petition of John S. Watts, attorney for petitioners, to the Surveyor General of New Mexico, praying for the confirmation of the Las Vegas Grandes Land Grant under the Act of Congress of July 22, 1854, being Defendant Santa Cruz Development Company's Exhibit 1, for the reason that the same was utterly irrelevant, incompetent and immaterial for any purpose whatsoever.

XVI.

The Court erred in overruling the objection of the defendants Joseph E. Wise and Lucia J. Wise to the introduction in evidence by Santa Cruz Development Company of a duly exemplified copy of the affidavits of Jose Francisco Salas, Manuel Antonio Baca, Jose Maria Montoya and Remijio Rivera, being defendant Santa Cruz Development Company's Exhibit 2, for the reason that the same were utterly incompetent, irrelevant and immaterial. Said affidavits taken before the Surveyor General of New Mexico, were offered for the purpose of proving who the heirs of Luis Maria Baca were, and were utterly immaterial and incompetent for that purpose or any other purpose.

XVII.

The Court erred in refusing the defendant Joseph E. Wise [500] to introduce in evidence and to file as part of the evidence in this case a duly authenticated copy of the judgment of the District Court of the county of Bernalillo, Territory of New Mexico, in the case of Jose L. Berca, et al., vs. Louis Sulzbacher, et al., and the report of the referee, referred to in said judgment, wherein that Court found and decreed that the said Antonio Baca, also known as Jose Antonio C. de Baca, was a son of the said Luis Maria Baca.

XVIII.

The Court erred in not permitting the defendant Joseph E. Wise to introduce in evidence and to file as part of the evidence in this case a duly authenticated copy of the affidavit signed and sworn to on November 10, 1879, by Prudencio C. de Baca, a son of Luis Maria Baca, which contained a full statement of all the children of said Luis Maria Baca and their descendants, including the said Antonio Baca and his descendants, under whom Joseph E. Wise claims title; said affidavit being an ancient document and being competent evidence on the subject of pedigree of said Antonio Baca and his descendants.

XIX.

The Court erred in not permitting the defendant Joseph E. Wise to introduce in evidence and to file as part of the evidence in this case a duly exemplified copy of an affidavit signed and sworn to on October 12, 1877, by Luis A. C. de Baca, a grandson of

Luis Maria Baca, and filed as a part of the record in the District Court of New Mexico, for Bernalillo County, in the case of *Perca vs. Sulzbacher*, and which affidavit set forth all of the children of said Luis Maria Baca, and all their descendants, and which affidavit showed that Antonio Baca, also known as Jose Antonio C. de Baca, under whose descendants defendant Joseph E. Wise in part de-raises title, was a son of said Luis Maria Baca. [501]

XX.

The Court erred in adjudging and decreeing that until the tract or parcel of land described in said judgment and decree was segregated from the public domain of the United States, on or about the 14th day of December, 1914, no adverse possession or statutory prescription could commence to be initiated by any party to this action, for the reason that the Supreme Court of the United States has heretofore held that the title in fee to said tract of land was vested in the heirs of Luis Maria Baca in the year 1863; and as the title had vested in said heirs at said time, the said tract of land was subject to the laws of the Territory of Arizona and State of Arizona, in regard to adverse possession and in regard to title by prescription; and the action of the Court in striking out all of the testimony of Joseph E. Wise and the admissions as to the testimony of Lucia J. Wise as to adverse possession, was erroneous.

XXI.

The Court erred in adjudging and decreeing that

the defendant Joseph E. Wise was vested with an absolute fee simple title to no greater interest than an undivided $1/38$ interest in the tract or parcel of land described in the decree; for the reason that under the evidence in this case, John S. Watts, at the time of his death, was seized in fee of an undivided $18/19$ interest in the said tract or parcel of land; that he died intestate in the year 1876, leaving a widow and heirs of age; that his said widow and heirs, upon his death, became seized in fee of the undivided $18/19$ interest aforesaid; that the said widow and heirs did, by their deed, duly executed and dated the 30th day of September, 1884, being Defendants Wise Exhibits 16 and 17, convey to David W. Bouldin, an undivided $2/3$ of their undivided $18/19$ interest in said tract of land; and that the defendants Wise, under and by virtue of the sheriff's sale made under the judgment and decree of the District [502] Court of the Territory of Arizona, in and for the county of Pima, hereinbefore referred to, and the sheriff's deed executed under said sale, and all proceedings, as hereinbefore set forth, has become and is the owner in fee of all of the right, title and interest so acquired by the said David W. Bouldin under the deed from said widow and heirs aforesaid, except the undivided $1/9$ of the said interest acquired by said Bouldins from said heirs of Watts, and which said undivided $1/9$ of the interest of said Bouldins, said Bouldins conveyed to John Ireland and Wilbur H. King, as hereinbefore set forth, and that the said Joseph E. Wise is the owner of the said interest so conveyed by Bouldin to said

John Ireland and said Wilbur H. King, under and by virtue of deeds of conveyance from the said Wilbur H. King and from the widow of said John Ireland, he being deceased; therefore, the said defendant Joseph E. Wise, in addition to the said undivided $1/38$ interest, is the owner in fee of an undivided $2/3$ of an undivided $18/19$ interest in and to said tract of land, and the said Court erred in not rendering its judgment and decree for the defendant Joseph E. Wise as to the said undivided $2/3$ of said $18/19$ interest in addition to the said undivided $1/38$ interest, and in not adjudging and decreeing that there was vested in said Joseph E. Wise, in addition to the said $1/38$ interest mentioned in said decree, a further interest, equal to $2/3$ of an undivided $18/19$ interest in the said tract or parcel of land, and in not quieting his title thereto.

XXII.

The Court erred in rendering its judgment and decree that the various recorded instruments, purporting to inure to the benefit of the said plaintiffs, or to the benefit of the said defendants Bouldin, or purporting to be in hostility to the title adjudicated in said decree in favor of the said plaintiffs, and of the said defendants Bouldin, or any or either of them, be removed [503] as clouds; and in removing the same as clouds upon the titles adjudicated to said plaintiffs, and to the said defendants Bouldin, and to each of them; for the reason that neither the said plaintiffs, nor the said defendants Bouldin, or any or either of them, has any right, title or interest whatsoever in the tract or parcel of land de-

scribed in said decree, and none of the recorded instruments mentioned in said decree, or any instruments whatsoever, are clouds upon the title of said plaintiffs, and the said defendants Bouldin, or any of them, and for the same reason the Court erred in rendering its decree quieting the title of the plaintiffs to said tract of land, and the title of said Bouldins to said tract of land, or any part thereof, as neither said plaintiffs nor said Bouldins have any title whatsoever to said tract of land described in said decree, or in dispute in this action.

XXIII.

That the Court erred in said judgment and decree in ordering and adjudging "that the temporary injunction heretofore granted against Joseph E. Wise, as modified, be made permanent as to the south half of the tract or parcel of land in said judgment and decree described"; the said injunction as modified and so made permanent by said decree, enjoins and restrains the said Joseph E. Wise "from erecting and re-erecting fences in, upon or around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs or their tenants, from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of the cattle of said plaintiffs, or their tenants, to and from the water or drinking places upon said Float, or prevent or obstruct the use of said water and land as heretofore used, etc." That said decree in said regard is erroneous for the following reasons:

1. That this is an action to quiet title and remove [504] clouds and not an action to restrain trespass,

or to determine any rights of possession of the respective parties to the action in the lands in dispute, and the decree of the Court, restraining the right to possession and enjoyment of defendant Joseph E. Wise to the south half, or any part of said lands, is erroneous.

2. That no issue in regard to trespass or rights of possession or fencing is made or raised by the pleadings and no such issues were in the case.

3. That there is no testimony or evidence in the case which proves or tends to prove, that said Wise had been, or was doing, any of the matters or things, or threatened to do any of the matters or things which the court has enjoined him from doing.

4. That the only object of the said injunction when first issued, was to preserve the property in *status quo* pending said action, and said object having been attained, it was the duty of the lower court to have dissolved the injunction and to have dismissed the same, upon rendering its decree, which decree does adjudge and find that Joseph E. Wise has an undivided interest in all of said tract of land.

5. That the judgment and decree of this court is that said defendant Joseph E. Wise is a tenant in common with the plaintiffs as to the south half of the tract of land aforesaid, and that his interest is undivided, and the injunction in said decree perpetually enjoins said Wise from the exercise of his rights and the use and enjoyment of said property as a tenant in common with plaintiffs, and is against the law and is not supported by any of the evidence in the case.

XXIV.

Each and all of the errors hereinabove assigned by the said defendant Joseph E. Wise as errors affecting him and his [505] interest and his rights, also equally affect the interest and rights of the defendants M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt, for the reason that said defendants deraign their title as heirs of John Ireland, deceased, and as such heirs claim an undivided half interest of all the right, title and interest which said John Ireland had in his lifetime; the other half interest having been conveyed by the widow of said John Ireland to said Joseph E. Wise, as hereinbefore set forth; and therefore, these defendants do now further assign as error each and all of the above assignments of error, as errors also affecting the said defendants, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt. [506]

WHEREFORE, by reason of the errors aforesaid, said Joseph E. Wise and Lucia J. Wise pray that the judgment and decree rendered and entered in said action be avoided, annulled and reversed, and that said District Court of the United States, for the District of Arizona, be directed to enter judgment and decree, adjudging and decreeing the said Joseph E. Wise, to be the owner in fee absolute of an undivided seventy-three one hundred and fourteenth ($73/114$) interest in and to the tract or parcel of land described in said decree, and be further adjudged and decreed to be the owner in fee absolute of all of the said 160 acre tract of land described as

follows: "The east half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the west half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirty-five (35), township twenty-two (22), south, Range 13 east, Gila & Salt River Meridian; and that his title to the said undivided interest, and to the said tract of land, be quieted as against the plaintiffs and all the other defendants in this action; that the said Lucia J. Wise be adjudged to be the owner in fee of the said forty (40) acres of land, described as follows: The northwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of section one (1), township twenty-three (23) south of Range thirteen (13) east, Gila and Salt River Base and Meridian, and that her title thereto be quieted as against the plaintiffs, and all other parties to this action; that the heirs of John S. Watts and the defendant Santa Cruz Development Company, as mesne grantee under said heirs, be decreed to be the owners of an undivided thirty-six one hundred and fourteenth ($\frac{36}{114}$) interest in said land and premises, and that defendant Margaret W. Wise be adjudged to be the owner in fee of an undivided one-thirty-eighth ($\frac{1}{38}$), equal to an undivided three-one hundred and fourteenth ($\frac{3}{114}$) interest, in said lands and premises, and that the said defendants M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt, as the heirs of John Ireland, be adjudged to be the owners in fee of an undivided two-one hundred [507] and fourteenth ($\frac{2}{114}$) interest in said tract or parcel of land described in the decree herein.

And that the plaintiffs Cornelius C. Watts and

576 *Joseph E. Wise and Lucia J. Wise vs.*

Dabney C. T. Davis, Jr., and the defendants James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, be adjudged and decreed to have no right, title or interest whatsoever in or to said tract or parcel of land.

SELIM M. FRANKLIN,

Attorney for Joseph E. and Lucia J. Wise defendants in the lower court.

Filed Nov. 1, 1915. [508]

[**Bond on Appeal of Joseph E. Wise and Lucia J. Wise.**]

In the United States District Court, for the District of Arizona.

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS, and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOULDIN,
JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE H. WISE,
DAVID W. BOULDIN, HELEN LEE BOULDIN,
M. I. CARPENTER, PATRICK C. IRELAND,
IRELAND GRAVES, ANNA R. WILCOX,
ELDREDGE I. HURT, and
W. G. RIFENBURG,

Defendants.

KNOW ALL MEN BY THESE PRESENTS:

That we, Joseph E. Wise and Lucia J. Wise as principals, and Chas. F. Solomon and B. M. Jacobs, both of Tucson, Arizona, as sureties, are held and firmly bound unto Cornelius C. Watts and Dabney C. T. Davis Jr., and unto James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, in the sum of One Thousand Dollars, lawful money of the United States, to be paid to them, or either or any of them, and to his, her or their respective executors, admisintrators and successors; for which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our heirs, executors and administrators and successors by these presents. Sealed with our seals and dated this 1st day of November, 1915.

Conditioned, that Whereas, on the 1st day of November, A. D. 1915, in the District Court of the United States, for the District of Arizona, in the suit pending in that court, wherein the said Cornelius C. Watts and Dabney C. T. Davis, Jr., were plaintiffs and Santa Cruz Development Company, James E. Bouldin, Jennie N. Bouldin, Joseph E. Wise, Lucia J. Wise, [509] Margagret E. Wise, Jesse H. Wise, David W. Bouldin, Helen Lee Bouldin, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, Eldredge I. Hurt and W. G. Rifenburg, were defendants, numbered on the equity docket as "In Equity E-5 (Tucson)" a judgment and decree was rendered against the said Joseph E. Wise and Lucia J. Wise, and the said Joseph E. Wise and Lucia J. Wise, having obtained an appeal

therefrom to the United States Circuit Court of Appeals, for the Ninth Circuit:

NOW, THEREFORE, if the said Joseph E. Wise and Lucia J. Wise shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

JOSEPH E. WISE.
LUCIA J. WISE.
CHAS. F. SOLOMON.
B. M. JACOBS.

State of Arizona,
County of Pima,—ss.

Chas. F. Solomon and B. M. Jacobs the sureties in the foregoing bond, being duly sworn, each for himself does depose and say, that he is a resident and householder within the District of Arizona, and is worth the amount specified in the foregoing bond or undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

CHAS. F. SOLOMON,
B. M. JACOBS.

Subscribed and sworn to before me this first day of November, 1915.

My commission expires March 12, 1916.

[Seal]

ANTHONY COENEN,
Notary Public.

Approved November 1, 1915.

WM. H. SAWTELLE,
Judge. [510]

[**Petition of Cornelius C. Watts and Dabney C. T. Davis, Jr., for Appeal and Order Allowing Appeal.**]

*In the District Court of the United States, in and for
the District of Arizona.*

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS, and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-
DIN, JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE H. WISE,
DAVID W. BOULDIN, HELEN LEE
BOULDIN, M. I. CARPENTER, PATRICK
C. IRELAND, IRELAND GRAVES, ANNA
R. WILCOX, ELDREDGE I. HURT, and
W. G. RIFENBURG,

Defendants.

Now come the above-named plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., in open court at the time of the rendition and signing of the decree in the above-entitled case and conceiving themselves aggrieved by that portion of said decree that recognizes the title of the defendants, Joseph E. Wise and Margaret W. Wise, to an undivided one thirty-eighth each of the tract or parcel of land the title to which is sought to be quieted in said action in the plaintiffs, and also that portion of said decree which does not

recognize and quiet the title of the plaintiffs in and to the whole of the south one-half of said tract or parcel of land, and the failure and refusal of said Court in not recognizing and quieting the whole of said south one-half of said tract of land in the plaintiffs, do hereby appeal from such portions of said decree to the Circuit Court of Appeals for the Ninth Circuit and they pray that this their appeal may be allowed and that a transcript of the record and proceedings and papers upon which said portions of said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals.

S. L. KINGAN,
Solicitor for Plaintiffs.

Dated Tucson, Arizona, Nov. 1, 1915.

And now, to wit, on Nov. 1, 1915, it is ordered that the appeal be allowed as prayed for.

WM. H. SAWTELLE,
Judge. [511]

*In the United States District Court for the District
of Arizona.*

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS, and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-
DIN, JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE H. WISE,

DAVID W. BOULDIN, HELEN LEE BOULDIN, M. I. CARPENTER, PATRICK C. IRELAND, IRELAND GRAVES, ANNA R. WILCOX, ELDREDGE I. HURT, and W. G. RIFENBURG,

Defendants.

Plaintiffs' Assignment of Errors.

Come now the plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., and file the following assignment of errors, upon which they will rely upon their prosecution of appeal in the above-entitled cause from so much of the decree made by this Honorable Court on the first day of November, 1915, as adjudicates that Joseph E. and Margaret W. Wise are respectively the owners of an undivided one thirty-eighth interest and that plaintiffs are not the owners of the whole of the south one-half in Baca Float No. 3, being that certain tract of land situate in the county of Santa Cruz, State of Arizona, described as follows, to wit:

“Commencing at a point one mile and a half from the base of the Salero mountain in a direction north forty-five degrees east of the highest point of said mountain running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and [512] forty-four links to the place of beginning; according to the survey of Philip Contzen filed in the

office of the Register and Receiver of the General Land Office for Arizona on or about December 14, 1914; said tract of land being known as Baca Float No. 3, and being third of the series of locations made on behalf of the heirs of Luis Maria Baca under the provisions of the sixth section of the act of Congress of June 21, 1860 (12 U. S. Stat. 71).”

1. The Court erred in adjudicating that, at the time of the commencement of the action, the title to the land described was and still is vested and hereby quieted in the defendant Joseph E. Wise to the extent of an undivided one-thirty-eighth of the whole, and in the defendant Margaret W. Wise to the extent of an undivided one thirty-eighth of the whole of said tract.

2. The Court erred in not adjudicating that the absolute fee simple title to the said land was, at the time of the commencement of the action, and still was, vested and was by the decree quieted in the plaintiffs to the south half of said tract and in the defendant Jennie N. Bouldin to an undivided one-half of the north half of said tract, and in the defendants David W. Bouldin and Helen Lee Bouldin respectively to an undivided one-fourth of the north half of said tract.

3. The Court erred in adjudicating that the respective titles of the defendants, Joseph E. Wise and Margaret W. Wise, as adjudicated in the decree be and the same thereby were severally quieted in them severally against the respective claims of the respective parties to the action.

4. The Court erred in not adjudicating that neither the defendant Joseph E. Wise or the defendant Margaret W. Wise had any right, title, interest, claim or demand in or to or incumbrance or lien upon the tract or parcel of land particularly described, or any part or portion thereof.

5. The Court erred in admitting in evidence a certain [513] deed executed by Juana L. Baca and others, and designated as Defendant Wise's Exhibit No. "8," the offer of which deed was made as follows:

"We will offer in evidence a deed dated the twentieth day of August, 1913, between Juana L. Baca, widow of Jose Baca, and Preciliana Baca and others, who are recited in the deed as the widow and children of Jose Baca, who is a son of Juan Manuel Baca, who was the son of Antonio Baca, the deed being made to Marcos C. de Baca."

Objection was made by the plaintiffs, Cornelius C. Watts and Dabney C. T. Davis to the introduction in evidence of said deed upon the ground that the defendant Joseph E. Wise claims under the deed of 1864 and the deed of 1871, made by the heirs of Luis Maria Cabeza de Baca to John S. Watts, and is bound by the recitals and covenants contained in said deeds to the effect that the grantors in said deeds were the owners in fee simple of the aforesaid property, Baca Float No. 3, and had full right to convey the same, and were all of the heirs of the said Luis Maria Cabeza de Baca.

Which objections were thereupon overruled by

the Court and the evidence admitted and exception duly taken.

In that the said Joseph E. Wise was claiming under the said deeds of 1864 and 1871, and the said plaintiffs were claiming under the same deeds, and that the defendant Wise was estopped by reason of said recitals and covenants, as against the said plaintiffs claiming under the same conveyance, to deny or controvert the said recitals and covenants, and for the further reason that there was no competent evidence that the persons executing said deed were the descendants and heirs of Antonio Baca, or that Antonio Baca was the son and heir of Luis Maria Cabeza de Baca.

6. The Court erred in admitting in evidence a certain deed executed by Guadalupe Mares de Sandoval and others, designated as defendant Wise's Exhibit "9," the offer of which [514] said deed was made as follows:

"I will offer in evidence this deed, which is dated the twenty-seventh day of August, 1913, between Guadalupe Mares de Sandoval and Meliton Mares, and others, children of Preciliana Baca de Mares, widow and children of Preciliana Baca, daughter of Juan Manuel Baca, who is the son of Antonio Baca."

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection and wherein the Court erred in ad-

mitting said deed in evidence. Exception was duly taken.

7. The Court erred in admitting in evidence a certain deed executed by Martina M. Baca and others, designated as defendant Wise's Exhibit No. "10," the offer of which said deed was made as follows:

"Then we offer a deed dated the twenty-first day of August, 1913, between Martina M. Baca, widow of Ignacio Baca, and the children of Ignacio Baca, named Guillerina Baca and Eloisa Baca, said Ignacio Baca being a son of Jose Baca, who is a son of Juan Manuel Baca, who is a son of Antonio Baca."

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

8. The Court erred in admitting in evidence a certain deed executed by Vidal N. de Mares, and designated as defendant Wise's Exhibit No. "11," the offer of which said deed was made as follows:

"Now I will offer the original deed, because I did not have a certified copy of it—I did not get this—from some more of the descendants of Antonio [515] Baca. The deed is dated the thirtieth day of August, 1913, and is between Vidal N. de Mares, widow of Ines Mares, Vi-

talia, Santiago and other Mares, who are also the children and descendants, etc., of Antonio.”

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

9. The Court erred in admitting in evidence a certain deed executed by Marcos C. de Baca and designated as Defendant Wise’s Exhibit number “12,” the offer of which said deed was made as follows:

“I will offer in evidence a deed dated the seventeenth day of September, 1913, from Marcos C. de Baca to Joseph E. Wise and Jesse Wise, conveying the property mentioned in the preceding deeds. I will state, your Honor, that Marcos C. de Baca was the same grantee in all the deeds I have mentioned.”

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

10. The Court erred in admitting in evidence a certain deed executed by Teofila Baca and others,

and designated as Defendant Wise's Exhibit No. "27," the offer of which said deed was made as follows:

"I will offer in evidence a deed from Teofila Baca et al. to Marcos C. de Baca. This seems to be a deed from Teofila Baca to Marcos C. de Baca. I do not happen to remember about that. This deed is dated August 20, 1913. That is another one of the daughters of Antonio, which evidently I had omitted this morning."

[516]

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

11. The Court erred in admitting in evidence a certain deed executed by Ciria Salazar, designated as Defendant Wise's Exhibit No. "28," the offer of which said deed was made as follows:

"I next offer in evidence a deed from Ciria Salazar to Joseph E. Wise and Jesse H. Wise, dated the eighth day of August, 1913."

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in ad-

mitting said deed in evidence. Exception was duly taken.

12. The Court erred in admitting in evidence certain statements of Marcos C. de Baca, as follows:

“Q. Mr. Baca, you have already stated that Prudencio Baca, who was a son of Luis Maria Baca, died in 1882, have you not? A. Yes, sir.

Q. Now, prior to that time did Prudencio Baca make any statements to you in regard to the relationship of Antonio Baca to Luis Maria Baca, deceased?

on the ground that it had already appeared in evidence that at the time of the alleged statements by Prudencio to Marcos Baca a controversy existed as to who were the children and descendants of Luis Maria Baca, among whom was the alleged Antonio, and that it did not appear that there was no controversy in this regard, at this time, and on the further ground that the [517] said Prudencio was one of the grantors of the plaintiffs, under whom they were claiming, and that the alleged declarations sought to be established, were made by him after he had parted with his title, and in derogation and disparagement of the title which he had conveyed, and upon the further ground that it appeared that the defendants Joseph E. Wise and Lucia J. Wise were claiming under the deeds of 1864 and 1871, and that the plaintiffs were claiming under said deeds; that in said deeds were recitals or covenants that the grantors therein, among whom was said Prudencio, were the owners in fee simple of said Baca Float No. 3, and had full right to sell the same, and that

the grantors were the sole heirs of Luis Maria Baca (the said alleged Antonio not being a grantor in said deeds), and that the said Joseph E. and Lucia J. Wise, claiming under said deeds, and under said Prudencio, were estopped as against said recitals and covenants, to deny as against said plaintiffs, the truth thereof. To which ruling of the Court, permitting the said Marcos Baca to testify in answer to said question, and other questions as to what said declarations were, the plaintiffs then and there duly excepted.

13. The Court erred in admitting in evidence certain statements of Marcos Baca, as follows:

“Q. Now, will you please state what Prudencio Baca said to you on the subject of the relationship of Antonio Baca to his father, Luis Maria Baca, at the conversation at Pena Blanca, 1873.”

The same objections to this evidence was made as are set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence. Objection was duly made, overruled, and exception taken. [518]

14. The Court erred in admitting in evidence certain statements of Marcos Baca as follows:

“Q. Please state what Prudencio Baca said to you in 1873 at Pena Blanca in regard to who Antonio Baca was, and in regard to his relationship, if any, with Prudencio Baca himself, or Luis Maria Baca?”

A. I was inquiring from him who the children of Luis Maria Baca were.

Q. Go on and state what he said.

A. He gave me the names, amongst them the name of Antonio, as the eldest child of Luis Maria.

Q. The eldest child? A. Yes, sir.

Q. Antonio Baca? A. Yes, sir."

To all of which the plaintiffs objected on the grounds set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence. The objections were overruled and exceptions duly taken.

15. The Court erred in admitting in evidence certain statements of Marcos Baca as follows:

"Q. Now, you will please state the substance of that conversation, so far as it related to Antonio Baca."

To which the plaintiffs objected on the grounds set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence. The objections were overruled, and exceptions duly taken.

16. The Court erred in admitting in evidence the testimony of Marcos Baca as follows:

“Q. Did you know a Manuel Baca, who was a son of Luis Maria Baca? A. Yes, sir.

Q. You have stated already you had a conversation with him in regard to Antonio?

A. Yes, sir. [519]

Q. Now, please state the conversation that took place with Manuel Baca at that time in regard to Antonio Baca.”

To which the plaintiffs objected, on the grounds set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here reported, and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence. The objections were overruled and exceptions duly taken.

17. The Court erred in admitting in evidence the testimony of Marcos Baca, as follows:

“Q. You said you were acquainted with Domingo Baca, a son of Luis Maria Baca?

A. Yes, sir.

Q. Please state what he said on the subject of Antonio Baca, the relationship of Antonio Baca and Don Luis Maria Baca?

To which the plaintiffs objected on the grounds set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence, substituting herein the word “Domingo” for “Pruden-

cio.” The objections were overruled and exceptions duly taken.

18. The Court erred in admitting in evidence the testimony of Marcos Baca, as follows:

“Now, in the conversation you had with Prudencio Baca was anything said in regard to whether or not Antonio Baca had any children?

A. Yes, sir.

Q. I am speaking now of the conversation of 1875. What did he say on that point?

To which the plaintiffs objected on the grounds set forth in assignment of error number twelve, and which said objections are not, for the sake of brevity, here repeated, [520] and it is prayed that reference may be had to said assignment number twelve for a statement of said objections and wherein the Court erred in admitting said statements in evidence. The objections were overruled and exceptions duly taken.

19. The Court erred in admitting the evidence and all thereof of Marcos Baca as to the declarations alleged to have been made to him by Prudencio, Manuel, Domingo and Tomas Baca, in that said declarations were hearsay as to pedigree, and, at the time they were alleged to be made, a controversy existed as to the children and the descendants of Luis Maria Baca, among whom was the alleged Antonio. The objections were overruled and exceptions duly taken.

20. The Court erred in not excluding the evidence and all thereof of Marcos Baca, as to the declarations alleged to have been made to him by Prudencio, Manuel, Domingo and Tomas Baca, in that

said declarations were hearsay as to pedigree, and, at the time they were alleged to be made, a controversy existed as to the children and the descendants of Luis Maria Baca, among whom was the alleged Antonio. The objections were overruled and exceptions duly taken.

21. The Court erred in rendering judgment for Joseph E. Wise and Margaret W. Wise as to 1/19 interest in Baca Float No. 3, in that the weight of the evidence was clearly against the existence of Antonio Baca, or that he was entitled to inherit or did inherit or that he left any heirs or that the persons alleged to be his heirs were such, and that such alleged heirs conveyed to the said Wises, and that there is no competent evidence in the record to support the judgment in this behalf.

22. The Court erred in admitting the evidence of Marcos Baca as to the declarations made by Prudencio, Manuel, Domingo and Tomas Baca in that each of the said persons had covenanted in the deed of 1864, signed by each and all of them, that they [521] were seized of Baca Float No. 3 in fee simple and had full right to convey the same, under which deed plaintiffs and the said Wises are grantees; that the alleged Antonio nor his alleged heirs were mentioned in said deed; that the said Prudencio, Manuel, Domingo and Tomas were estopped as against their grantees, plaintiffs herein, to deny the truth of said covenants; that the defendant, Joseph E. Wise, and the plaintiffs are grantees under said deed containing said covenants and claiming under said deed, and that the said Joseph E. Wise is es-

topped to deny or disprove the recitals or covenants in said deed, while claiming thereunder as against the plaintiffs.

23. The Court erred in admitting the evidence of Marcos Baca as to the declarations alleged to have been made to him as to Antonio Baca and his heirs by Prudencio, Manuel, Domingo, and Tomas Baca, in that the said Prudencio, Manuel, Domingo and Tomas Baca had theretofore conveyed the said property in this action involved and had covenanted in said conveyance that certain persons, not including the said Antonio and his heirs, were seized of full title in fee simple of said land; that the alleged declarations made by them to Marcos Baca after they had conveyed were mere voluntary statements not under oath and were directly opposite and contrary to their covenants in said deed, and were in disparagement of, and, if admitted, partially destroyed the title which they had conveyed and which is now held by the plaintiffs herein; that the plaintiffs are the grantees of the said Prudencio, Manuel, Domingo and Tomas Baca, claiming under and relying upon the deeds of 1864 and 71 and claiming under and relying upon the covenants made by them in said deeds; and that the declarations of the said grantors, made after their covenants, are repugnant to the covenants made by them and in disparagement of the title which they had conveyed, and are inadmissible and incompetent as against said grantees. [522]

24. The Court erred in admitting in evidence the alleged will of Luis Maria Baca, together with the petition of the executor attached thereto, in that the

same were irrelevant, immaterial and incompetent, and did not tend to prove any of the issues in the case, in this: That the alleged will and petition show that Luis Maria Baca had a deceased son, and did not show that said son was Antonio; that it appeared that said son had received advances, and was not entitled to inherit, and consequently was not one of the heirs of Luis Maria Baca, nor were his wife or children heirs; that the question of the right to inherit was referred to the courts, and that it does not appear that the adjudication on the right to inherit was in favor of the heirs of the alleged Antonio; that the sixth section of the Act of Congress of June 21, 1860, declared that it should be lawful for the heirs of said Luis Maria Baca, who made claim to the Las Vegas grant, to select certain land (of which the land in question here is a part) and that the heirs of the alleged Antonio, the grantors of the defendants Joseph E. and Margaret W. Wise, did not make claim to said land, or present any claim for same.

That the plaintiffs duly excepted to the admission of said evidence.

WHEREFORE, plaintiffs—appellants—pray that said decree, in so far as it adjudicates and quiets the title of an undivided one thirty-eight of the south half of said Baca Float No. 3 in Joseph E. Wise and a like amount in Margaret W. Wise, be reversed, and that said District Court for the District of Arizona, be ordered to enter a decree quieting the title of appellants as against said Joseph E. and Marga-

ret W. Wise, and all other parties to this action, in said one-nineteenth.

HARTWELL P. HEATH,
S. L. KINGAN,
Solicitors for Appellants. [523]

*In the United States District Court for the District
of Arizona.*

IN EQUITY—E-5 (TUCSON.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-
DIN, JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE H. WISE,
DAVID W. BOULDIN, HELEN LEE
BOULDIN, M. I. CARPENTER, PAT-
RICK C. IRELAND, IRELAND GRAVES,
ANNA R. WILCOX, ELDREDGE I. HURT,
and W. G. RIFENBURG,

Defendants.

**Bond on Appeal of Cornelius C. Watts and Dabney
C. T. Davis, Jr.**

KNOW ALL MEN BY THESE PRESENTS:
That we, Cornelius C. Watts and Dabney C. T.
Davis, Jr., of Charleston, West Virginia, as princi-
pals, and Alfred S. Donau and A. J. Davidson, of
the county of Pima, State of Arizona, as sureties,
are held and firmly bound unto Joseph E. Wise and

Margaret W. Wise in the sum of One Thousand (\$1,000) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators firmly by these presents.

SEALED with our seals and dated this 1st day of November, 1915.

WHEREAS, the above-named Cornelius C. Watts and Dabney C. T. Davis, Jr., have appealed to the Circuit Court of Appeals of the Ninth Circuit to reverse a part and portion of the judgment of the District Court for the District of Arizona in the above-entitled cause, said part and portion of such judgment [524] being the part thereof that recognizes the ownership of an undivided one nineteenth interest in and to the south one-half of what is commonly known as Baca Float No. 3, situate, in Santa Cruz County, Arizona, in Joseph E. and Margaret W. Wise, and being property involved in the above-entitled action, and being that part and portion of said judgment which does not recognize and quiet the title of the principals herein in and to the whole of the south one-half of the said parcel of land;

NOW THEREFORE, the condition of this obligation is such that if the above-named Cornelius C. Watts and Dabney C. T. Davis, Jr., shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obliga-

tion shall be void, otherwise to remain in full force and effect.

CORNELIUS C. WATTS,
DABNEY C. T. DAVIS, Jr.,
By S. L. KINGAN,
Atty. in Fact,
A. J. DAVIDSON,
ALFRED S. DONAU.

State of Arizona,
County of Pima,—ss.

On the 1st day of November, 1915, personally appeared before me Alfred S. Donau and A. J. Davidson, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as sureties, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Alfred S. Donau and A. J. Davidson, being respectively by me duly sworn, says, each for himself and not one for the other, that he [525] is a resident and householder of the said county of Pima, and that he is worth the sum of One Thousand (\$1,000) Dollars over and above his just debts and legal liability, in property not exempt from execution.

A. J. DAVIDSON,
ALFRED S. DONAU.

Subscribed and sworn to before me this 1st day of November, 1915.

G. H. LANGWORTHY,
Notary Public.

My commission expires Dec. 15, 1917.

APPROVED this 1st day of November, 1915.

WM. H. SAWTELLE,

Judge. [526]

*In the United States District Court for the District
of Arizona.*

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY, a
Corporation, et al.,

Defendants.

**Praecipe [Designating Additional Portions of
Record].**

Appellants, Cornelius C. Watts and Dabney C. T. Davis, Jr., hereby request that the following portions of the record in the above-entitled cause be incorporated in the transcript on the appeal of these appellants in this cause, in addition to those set forth in praecipe filed on behalf of appellants Joseph E. and Lucia J. Wise:

(1) Assignments of error of Cornelius C. Watts and Dabney C. T. Davis, Jr.;

(2) Bond on Appeal of Cornelius C. Watts and Dabney C. T. Davis, Jr.;

(3) Stipulation that only one record be taken up and that it be deemed the record of all the parties.

Dated, at Tuscon, Arizona, this 15th day of November, 1915.

HARTWELL P. HEATH,
S. L. KINGAN,

Attorneys for Cornelius C. Watts and Dabney C. T.
Davis, Jr.

I hereby admit service on this . . . day of November, 1915, of the foregoing praecipe.

JOHN H. CAMPBELL,
Attorneys for the Bouldins.

J. D. MOCKAY,

Attorney for Intervenors, M. I. Carpenter, et al.

S. M. FRANKLIN,

Attorney for Joseph E. and Lucia J. Wise.

JAMES R. DUNSEATH,

Attorney for Jesse H. and Margaret E. Wise. [527]

**[Petition of James E. Bouldin et al. for Appeal and
Order Allowing Appeal.]**

*In the District Court of the United States, in and
for the District of Arizona.*

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-
DIN, JOSEPH E. WISE, LUCIA J. WISE,
JESSE H. WISE, DAVID W. BOULDIN,

HELEN LEE BOULDIN, M. I. CARPENTER, PATRICK C. IRELAND, IRELAND GRAVES, ANNA R. WILCOX, ELDREDGE I. HURT and W. G. RIFENBURG,

Defendants.

Now come the above-named defendants, James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, in open court, at the time of the rendition and signing of the decree in the above-entitled cause, and conceiving themselves aggrieved by that portion of said decree that recognizes the title of the Defendants Joseph E. Wise and Margaret W. Wise to an undivided one thirty-eighth each of the tract or parcel of land, the title to which is sought to be quieted in said action, and also that portion of said decree which does not recognize and quiet the title of the said defendants in and to the whole of the north half of said tract or parcel of land, and the failure of said Court in not recognizing and quieting the whole of said north one-half of said tract of land in the said defendants, do hereby appeal from such portions of said decree to the Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said portions of said decree were made, duly authenticated, may be sent to said Circuit Court of Appeals.

JOHN H. CAMPBELL,

Solicitor for the Defendants James E. Bouldin,
Jennie N. Bouldin, David W. Bouldin and Helen
Lee Bouldin.

Dated at Tuscon, Arizona, November 1, 1915.

And now, to wit, on November 1, 1915, it is allowed that the appeal be allowed as prayed for.

WILLIAM H. SAWTELLE,
Judge. [528]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—E-5 (TUCSON).

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N. BOUL-
DIN, JOSEPH E. WISE, LUCIA J. WISE,
MARGARET W. WISE, JESSE E. WISE,
DAVID W. BOULDIN, HELEN LEE
BOULDIN, M. I. CARPENTER, PATRICK
C. IRELAND, IRELAND GRAVES, ANNA
R. WILCOX, ELDREDGE I. HURT and W.
G. RIFENBURG,

Defendants.

Assignment of Errors [of James E. Bouldin et al.].

Come now the defendants, James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, and file the following assignment of errors, upon which they will rely upon their prosecution of appeal in the above-entitled cause from so much of the decree made by this Honorable Court on the first day of November, 1915, as adjudicated that Joseph

E. Wise and Margaret W. Wise are respectfully the owners of an undivided one thirty-eighth interest and that said defendants are not the owners of the whole of the north one-half in Baca Float No. 3, being that certain tract of land situate in the County of Santa Cruz, State of Arizona, described as follows, to wit:

Commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees East of the highest point of said mountain, running thence from said beginning point West twelve miles, thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; and thence North twelve miles thirty-six chains and forty-four links to the place of beginning; according to the survey of Philip Contzen filed in the office of the Register and Receiver of the General Land Office for Arizona on or about December 14, 1914; said tract of land being known as Baca Float No. 3, and being third of the series of locations made on behalf of the heirs of Luis Maria Baca under the provisions of the Sixth Section of the act of Congress of June 21, 1860 (12 U. S. Stat. 71). [529]

1. The Court erred in adjudicating that, at the time of the commencement of the action, the title to the land described was and still is vested and hereby quieted in the defendant Joseph E. Wise to the extent of an undivided one thirty-eighth of the

whole, and in the defendant Margaret W. Wise to the extent of an undivided one thirty-eighth of the whole of said tract.

2. The Court erred in not adjudicating that the absolute fee-simple title to the said land was, at the time of the commencement of the action, and still was, vested and was by the decree quieted in the plaintiffs to the south half of said tract and in the defendant Jennie H. Bouldin to an undivided one-half of the north half of said tract, and in the defendants David W. Bouldin and Helen Lee Bouldin respectively to an undivided one-fourth of the north half of said tract.

3. The Court erred in adjudicating that the respective titles of the defendants Joseph E. Wise and Margaret W. Wise as adjudicated in the decree be and the same thereby were severally quieted in them severally against the respective claims of the respective parties to the action.

4. The Court erred in not adjudicating that neither the defendant Joseph E. Wise or the defendant Margaret W. Wise had any right, title, interest, claim or demand in or to, or incumbrance or lien upon, the tract or parcel of land particularly described, or any part or portion thereof.

5. The Court erred in admitting in evidence a certain deed executed by Juana L. Baca and others, and designated as Defendant Wise's Exhibit No. "8" the offer of which deed was made as follows:

We will offer in evidence a deed dated the twentieth day of August, 1913, between Juana L. Baca, widow of Jose Baca, and Precilana

Baca and others, who are recited in the deed as the widow and children of Jose Baca, who is a son of Juan Manuel Baca, who was the son of Antonio Baca, the deed being made to Maria C. de Baca. [530]

Objection was made by the defendants Bouldin, Cornelius C. Watts and Dabney C. T. Davis to the introduction in evidence of said deed upon the ground that the defendant Joseph E. Wise claims under the deed of 1864 and the deed of 1871, made by the heirs of Luis Maria Cabeza de Baca to John S. Watts, and is bound by the recitals and covenants contained in said deeds to the effect that the grantors in said deeds were the owners in fee simple of the aforesaid property, Baca Float No. 3, and had full right to convey the same, and were all of the heirs of the said Luis Maria Cabeza de Baca.

Which objections were thereupon overruled by the Court and the evidence admitted and exception duly taken.

In that the said Joseph E. Wise was claiming under the said deeds of 1864 and 1871, and the said Defendants Bouldin were claiming under the same deeds, and that the defendant Wise was estopped by reason of said recitals and covenants, as against the said Defendants Bouldin claiming under the same conveyances, to deny or controvert the said recitals and covenants, and for the further reason that there was no competent evidence that the persons executing said deed were the descendants and heirs of Antonio Baca, or that Antonio Baca was the son and heir of Luis Maria Cabeza de Baca.

6. The Court erred in admitting in evidence a certain deed executed by Guadalupe Mares de Sandoval and others, designated as Defendant Wise's Exhibit No. "9," the offer of which said deed was made as follows:

I will offer in evidence this deed, which is dated the twenty-seventh day of August, 1913, between Guadalupe Mares de Sandoval and Meliton Mares, and others, children of Preciliana Baca de Mares, widow and children of Preciliana Baca, daughter of Juan Manuel Baca, who is the son of Antonio Baca.

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, [531] for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objections and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

7. The Court erred in admitting in evidence a certain deed executed by Martina M. Baca and others, designated as Defendant Wise's Exhibit No. "10," the offer of which said deed was made as follows:

Then we offer a deed dated the twenty-first day of August, 1913, between Martina M. Baca, widow of Ignacio Baca, and the children of Ignacio Baca, named Guillerina Baca and Eloisa Baca, said Ignacio Baca being a son of Jose Baca, who is a son of Juan Manuel Baca, who is the son of Antonio Baca.

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

8. The Court erred in admitting in evidence a certain deed executed by Vidal N. de Mares, and designated as Defendant Wise's Exhibit No. "11," the offer of which said deed was made as follows:

Now, I will offer the original deed, because I did not have a certified copy of it—I did not get this—from some more of the descendants of Antonio Baca. The deed is dated the thirteenth day of August, 1913, and is between Vidal N. de Mares, widow of Ines Mares, Vitalia, Santiago and other Mares, who are also the children and descendants, etc., of Antonio.

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in admitting said deed in evidence. Exception was duly taken. [532]

9. The Court erred in admitting in evidence a certain deed executed by Marcos C. de Baca and designated as Defendant Wise's Exhibit number "12," the offer of which said deed was made as follows:

I will offer in evidence a deed dated the seventeenth day of September, 1913, from Marcos C. de Baca to Joseph E. Wise and Jesse Wise, conveying the property mentioned in the proceeding deeds. I will state, your Honor, that Marcos C. de Baca was the same grantee in all the deeds I have mentioned.

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection, and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

10. The Court erred in admitting in evidence a certain deed executed by Teofile Baca and others, and designated as Defendant Wise's Exhibit No. "27," the offer of which said deed was made as follows:

I will offer in evidence a deed from Teofile Baca et al. to Marcos C. de Baca. This seems to be a deed from Teofile Baca to Marcos C. de Baca. I do not happen to remember about that. This deed is dated August 30, 1913. That is another one of the daughters of Antonio, which evidently I had omitted this morning.

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of

said objections and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

11. The Court erred in admitting in evidence a certain deed executed by Ciria Salasar, designated as Defendant Wise's Exhibit No. "28," the offer of which said deed was made as follows:

I next offer in evidence a deed from Ciria Salasar to Joseph E. Wise and Jesse H. Wise, dated the eighth day of August, 1913. [533]

The same objection was made to this deed as is set forth in assignment of error number five, which said objection is not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said assignment number five for a statement of said objection and wherein the Court erred in admitting said deed in evidence. Exception was duly taken.

The Court erred in admitting in evidence certain statements of Marcos C. Baca, as follows:

Q. Mr. Baca, you have already states that Prudencio Baca, who was a son of Luis Maria Baca, died in 1882, have you not?

A. Yes, sir.

Q. Now, prior to that time did Prudencio Baca make any statements to you in regard to the relationship of Antonio Baca to Luis Maria Baca, deceased?

on the ground that it had already appeared in evidence that at the time of the alleged statements by Prudencio to Marcos Baca a controversy existed as to who were the children and descendants of Luis Maria Baca, among whom was the alleged Antonio,

and that it did not appear that there was no controversy in this regard, at this time, and on the further ground that the said Prudencio was one of the grantors of the defendants Bouldin, under whom they were claiming, and that the alleged declarations sought to be established, were made by him after he had parted with his title, and in derogation and disparagement of the title which he had conveyed, and upon the further ground that it appeared that the defendants Joseph E. Wise and Lucia J. Wise were claiming under the deeds of 1864 and 1871, and that the Defendants Bouldin were claiming under said deeds; that in said deeds were recitals or covenants that the grantors therein, among whom was said Prudencio, were the owners in fee simple of said Baca Float No. 3, and had full right to sell the same, and that the grantors were the sole heirs of Luis Maria Baca, (the said alleged Antonio not being a grantor in said deeds), and [534] that the said Joseph E. and Lucia J. Wise, claiming under said deeds, and under said Prudencio, were estopped as against said recitals and covenants, to deny as against said defendants Bouldin, the truth thereof. To which ruling of the Court, permitting the said Marcos Baca to testify in answer to said question, and other questions as to what said declarations were, the Defendants Bouldin then and there duly excepted.

13. The Court erred in admitting in evidence certain statements of Marcos Baca, as follows:

Q. Now, will you please state what Prudencio Baca said to you on the subject of the rela-

2
NO. 2719

**United States Circuit Court
of Appeals,
Ninth Circuit**

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

against

CORNELIUS C. WATTS, et al.,
Appellees.

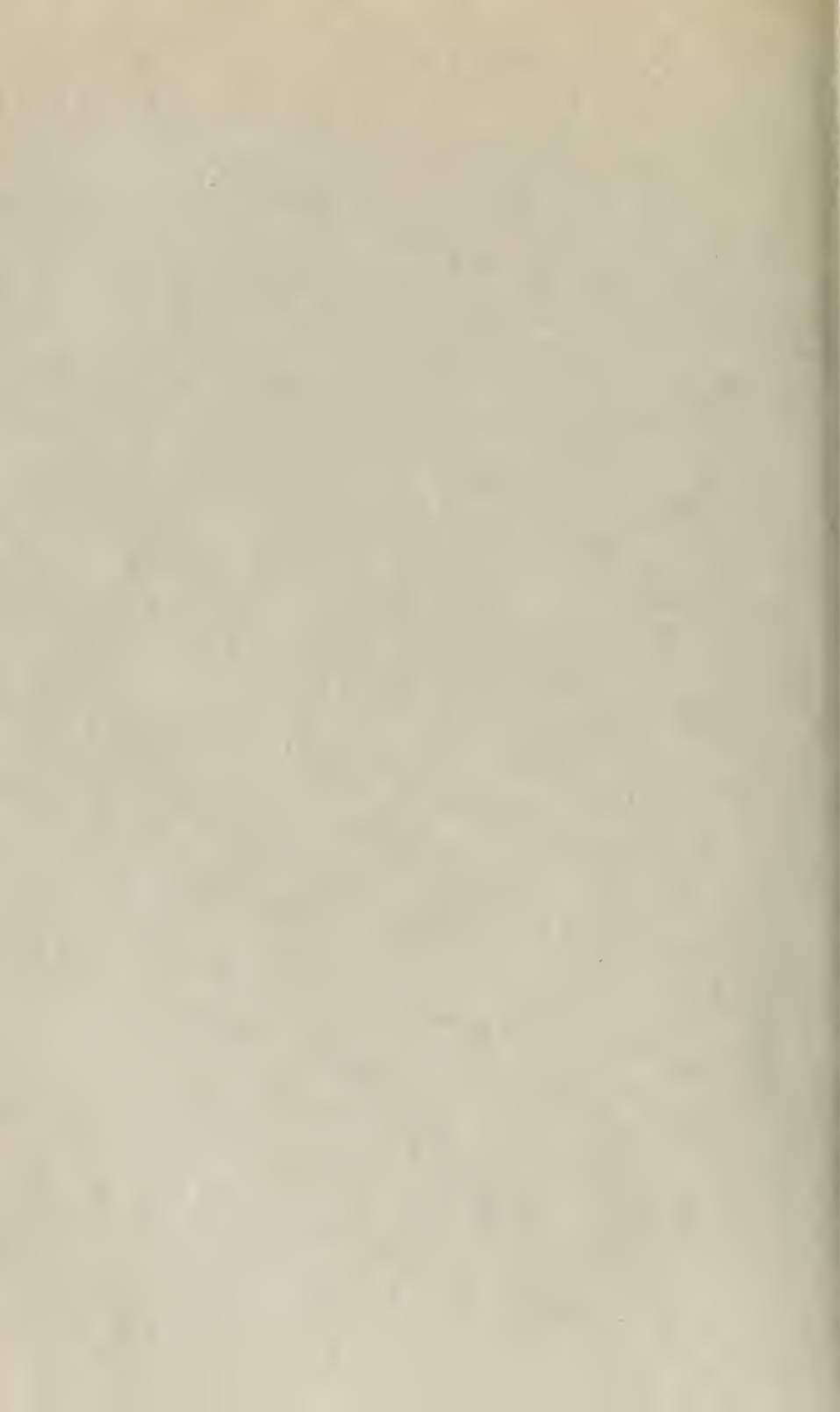
**Brief in behalf of Santa Cruz Development
Company, Appellant.**

G. H. BREVILLIER,
*Counsel for Santa Cruz Develop-
ment Company, Appellant.*

Filed

JAN 29 1916

F. D. Monckton,
Clerk.



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United States Circuit Court
of Appeals,

NINTH CIRCUIT.

SANTA CRUZ DEVELOPMENT COMPANY,
Appellant,

against

CORNELIUS C. WATTS, et al.,
Appellees.

No. 2719

**BRIEF IN BEHALF OF SANTA CRUZ
DEVELOPMENT COMPANY, AP-
PELLANT**

Statement of Case.

Nature of the Action

This is an appeal by Santa Cruz Development Company, one of the defendants below, from a decree of the United States District Court for the District of Arizona, in an action brought by Messrs. Watts and Davis as plaintiffs to quiet title to a tract of approximately 100,000 acres of land in Santa Cruz (formerly Pima) County, Arizona, and now known as Baca Float or Location No.

The name *Baca float* is inaccurate and of recent coinage. The grant was a "float" until proper selections were made; then the selections became "locations."

The chief controversy herein arises because Messrs. Watts and Davis and the defendants Bouldin claim title to the tract under a chain of deeds, beginning with the deed from Watts to Hawley (P. R. 193), which describe by proper metes and bounds an entirely different tract.

The plaintiffs expressly disavowed any desire to have any instrument reformed (P. R. 186). They stand upon their deeds; but ask the Court to disregard the metes and bounds therein of another tract, so that the deeds may cover the land involved herein.

The various defendants filed answers in the nature of cross bills setting up their respective chains of title, and prayed for the quieting thereof (See stipulation, P. R. 119).

Act of Congress

By the sixth section of the Act of June 21, 1860 (12 Stat. L. 71), Congress enacted:

"That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the Town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land

so selected by the said heirs of Baca when thereunto required by them, provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

1863 Location

In pursuance of this statute John S. Watts, on June 17, 1863, as attorney for the Baca heirs, selected and located, as Location No. 3 of the Baca series, the tract of land in controversy herein and known as the 1863 tract (P. R. 174).

Title to this tract passed from the United States to the heirs of Baca on April 9, 1864, on the approval of the location by the Commissioner of the General Land Office and his order that it be surveyed (*Lane v. Watts*, 234 U. S. 525; 235 U. S. 17).

The 1863 tract begins at a point one and one-half miles from the base of the Salero Mountain, in a direction north 45 degrees east of the highest point of said mountain; and running thence from said beginning point west, south, east and north, each course being twelve miles thirty-six chains and forty-four links.

On May 1st, 1864, this tract of land was conveyed to John S. Watts by most of the Baca heirs in a full covenant warranty deed (P. R. 154, 165). On May 30, 1871, the other heirs, as we contend, conveyed to John S. Watts (P. R. 197).

There is a contention by two of the parties herein, Joseph E. Wise and Margaret W. Wise, that Antonio

Baca or Jose Antonio Baca was also an heir and entitled to a one-nineteenth interest in said land, and that he did not convey to John S. Watts, but that they acquired title from his heirs. This phase of the case is discussed in a brief in which we join with the plaintiffs and the defendants Bouldin.

1866 Location

On April 30, 1866, John S. Watts, as attorney for the Baca heirs, applied to the Commissioner of the General Land Office for permission to change the initial point of the location made in 1863, so as to begin three miles west by south of the building known as the "Hacienda de Santa Rita" and running thence north, east, south and west twelve miles, thirty-six chains and forty-four links in each course to the place of beginning (P. R. 176). This we shall call hereafter the 1866 tract. As will be seen by reference to the map herein, the 1866 tract is an entirely different tract from the 1863 tract, although slightly overlapping it.

On May 21, 1866, the Commissioner approved the 1866 location and ordered a survey thereof,

"provided by so doing the out-boundaries of the grant thus surveyed will embrace vacant land not mineral" (P. R. 177).

Status of two locations in 1870

By applying for the 1866 tract and receiving a conditional approval thereof, John S. Watts impliedly con-

sented that on receiving a valid approval, the Commissioner's letter and order of April 9, 1864, which passed title to the 1863 location, should be deemed vacated and withdrawn and title to the 1863 tract revested in the United States.

As the grant of the 1866 tract was subject to the condition precedent of a satisfactory explorative survey, the title of John S. Watts to the 1863 tract became subject to defeasance on the valid absolute approval of the 1866 tract. A purchaser of the 1866 tract would not get absolute title to it until the valid performance of the condition precedent attached thereto. On the due performance of that condition, the United States would be revested of its title to the 1863 tract and divested of its title to the 1866 tract.

In 1870 and until the disposal of the condition in the grant of the 1866 tract, John S. Watts had an absolute title to the 1863 tract, subject to defeasance as above stated, and a conditional title to the 1866 tract.

Locality of Tracts

The 1866 tract is located within the Santa Rita Mountains and no part of the 1863 tract, except the overlap, lies therein. In the overlap of the two tracts (approximately 5,000 acres) and near Salero Mountain lie the foothills of the Santa Rita Mountains. These mountains run northwesterly and southeasterly from the highest peak therein known as "Mount Wrightson" or "Old Baldy." This is shown by the topography and the direction of the streams appearing on the map herein.

The 1863 tract comprises mostly land in the valley of the Santa Cruz River and grazing land contiguous thereto. The 1866 tract is mountainous mineral land.

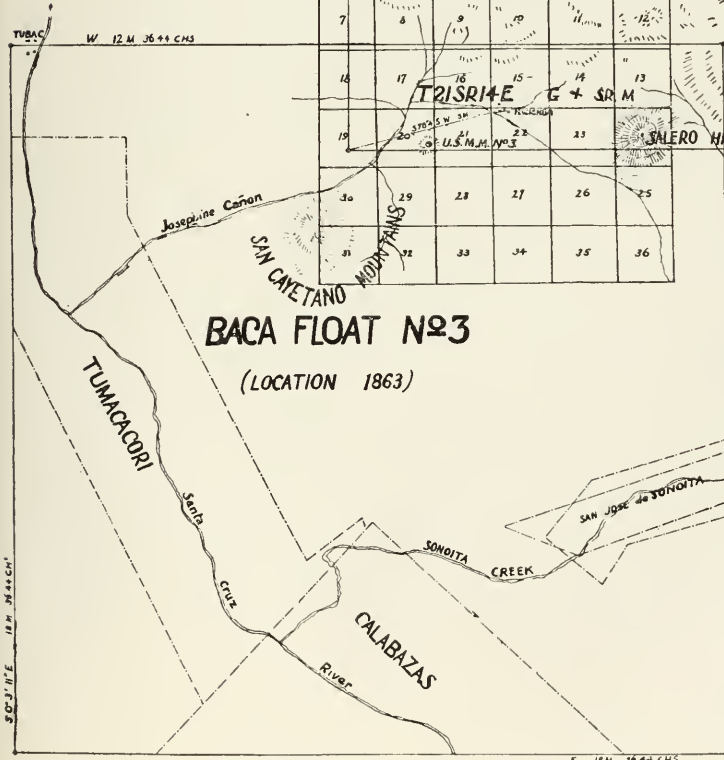
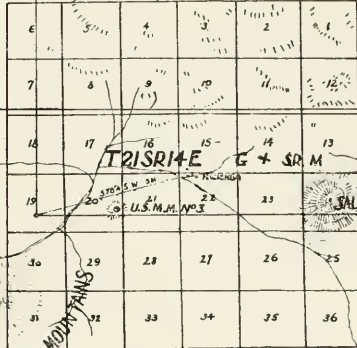
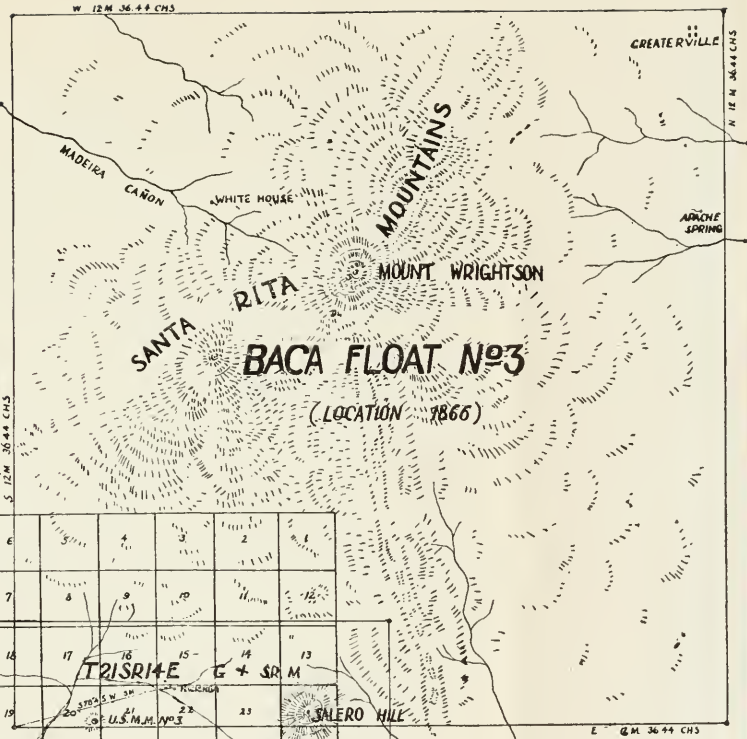
In 1870, practically all of the land in the 1863 tract of any value whatsoever was claimed adversely under a Mexican grant called the "Tumacacori and Calabasas grant"; and there was also a claim made for the San Jose de Sonoita grant. In 1899, the Tumacacori and Calabasas grant and a large part of the Sonoita grant were declared invalid by the United States Supreme Court.

Testimony as to 1866 Tract

The witness Magee came to Arizona in December, 1874, in behalf of a mining company to take charge of the 1866 tract and to have it surveyed, and remained on the tract for fifteen years. Hawley arrived shortly thereafter and Magee pointed out the 1866 tract to him. As Hawley gave Mr. Magee a power of attorney, the relations between Hawley and the company were friendly and mutual. Mr. Magee requested the Surveyor General of Arizona to execute the survey of the 1866 tract, ordered by the Commissioner of the General Land Office on May 21, 1866, but the Surveyor General refused to make the survey, stating he knew that the entire 1866 tract was notoriously mineral land to which no absolute title could pass under the Commissioner's order. Mr. Magee testified that he had nothing to do whatever with the 1863 tract (See Magee testimony, P. R. 249 to 255).

The testimony also shows that Hacienda de Santa Rita, the monument of the 1866 tract, was and is a well known

DEFT. WISE Ex. 34.



MAP
 SHOWING RELATIVE POSITIONS
 OF THE LOCATIONS MADE IN—
 1863 AND 1866 RESPECTIVELY
 OF THE
BACA FLOAT No. 3
 (ARIZONA)

SOUTH 12 M 36 44 CHS

N 12 M 36 44 CHS

N 12 M 36 44 CHS

E 12 M 36 44 CHS

building; and that the 1866 tract was surveyed in 1887 under the direction of Mr. Bouldin, then associated with the Hawley title claimants. Mr. Bouldin placed many monuments on the exterior lines and spectacularly took possession of the 1866 tract.

Subsequent History of the 1866 Tract

In 1885, John C. Robinson, who had received a conveyance from Hawley, applied to the Commissioner of the General Land Office for leave to select another tract in lieu of the 1866 tract, stating that the latter tract was mineral land and therefore the grant in the Commissioner's letter of May 21, 1866, could never operate (P. R. 180). This application was allowed by Commissioner Harrison; but in 1887 Secretary Lamar overruled the Commissioner in so far as a relocation was allowed (P. R. 182).

In 1893, Mr. Cameron, who then held the Hawley title, applied to the Surveyor General of Arizona for a survey of the 1866 tract (P. R. 327). The application was denied for the stated reason that the land in question was mineral land.

On July 25, 1899, the Secretary of the Interior (29 L. D. 44), on an application for the survey of the 1866 tract, decided that the 1866 location was invalid, as it was not an amendment of the location of 1863 but substantially a new location made after the three year period.

In 1901, Alex F. Mathews, who then held at least one-half of the Hawley title, applied to the Secretary of the

Interior for a reversal of the decision of July 25, 1899, and asked to be allowed to keep the 1866 tract, alleging *inter alia* that, with the acquiescence of the Government, it had passed from grantee to grantee for large considerations as Baca Float No. 3 (P. R. 396). The prayer for reversal was not granted.

Subsequent History of 1863 Tract

At no time since its location has the legal existence of the 1863 tract as a location been disregarded. After the conflicting Mexican grants were declared invalid in 1899, it became valuable commercially. Only since the entry in 1906 or 1907 of Messrs. Watts and Davis (both lawyers) have the Hawley title claimants sought the 1863 tract.

On June 23, 1914, appeared the opinion of the United States Supreme Court in the case of *Lane v. Watts*, 234 U. S. 525 (see also 235 U. S. 17), holding that the legal title to the 1863 tract passed from the United States to the Baca heirs on April 9, 1864. The Court affirmed the decree of the Supreme Court of the District of Columbia, which directed the Commissioner of the Land Office and the Secretary of the Interior to file the official plat of survey as a muniment of title, and also enjoined them from treating the land as public land.

The chain of title under the Hawley deed was offered in evidence in *Lane v. Watts*, and also the chain of title under which Santa Cruz Development Company claims. None of the questions herein was involved or passed upon in that case.

Hawley Deed

On January 8, 1870, John S. Watts executed a quit-claim deed in favor of Christopher E. Hawley (P. R. 193) for a tract of land in the Santa Rita Mountains, recited to have been granted by the United States to the Baca heirs and by said heirs conveyed to the grantor by deed dated May 1, 1864, bounded and described by the metes and bounds of the 1866 tract, "said tract of land being *known as* Location No. 3 of the Baca series." This deed was not recorded until 1885. Most of the difficulties in this case arise through the conflicting contentions as to the construction of that deed.

Messrs. Watts and Davis and the Bouldins claim that the deed conveyed on its face and was intended to convey the 1863 tract, as Location No. 3 of the Baca series, although the 1866 tract alone was described therein by metes and bounds, had been granted to the Baca heirs on May 21, 1866 and was in fact then "known as Location No. 3 of the Baca series."

Assertions of Title by Watts Heirs

As before stated, John S. Watts on May 30, 1871, over a year after the Hawley deed, took a deed from other Baca heirs for Location No. 5, and also for a confirmation of the title to him of the 1863 tract (P. R. 197).

In 1877, shortly after his father's death, J. H. Watts, son of John S. Watts, asserted ownership in a letter to the Commissioner of the Land Office (P. R. 178).

In 1884, the Watts heirs still claimed ownership and tried to have their title cleared of conflicting titles and grants (P. R. 272).

In 1899, their title was conveyed to John Watts.

In 1913, John Watts conveyed to James W. Vroom, who conveyed to Santa Cruz Development Company.

Instrument of September 30, 1884

The defendants Joseph E. Wise, Ireland intervenors and possibly the Bouldins also, claim that a paper executed by John Watts on September 30, 1884, in his own name and by assuming to act as attorney-in-fact for the other heirs of his father, John S. Watts, is an absolute conveyance of a two-thirds interest (P. R. 272). This point becomes material if this Court holds that the Hawley deed did not convey all of the 1863 tract.

Santa Cruz Development Company contends that the paper on its face is only an executory contract which was never performed; that if it be treated as a conveyance, there was no authority in John Watts to execute it for his mother, brother and sisters; and that if a conveyance, it is "absolutely null and void" under United States R. S. 3477, even between the parties, because of its subject matter and its failure to comply with the statutory formalities of execution.

No attempt was made at the trial by any of our opponents to prove any performance of the contract.

Testimony of John Watts

John Watts, whose deposition was taken in behalf of the defendant Joseph E. Wise and is uncontradicted,

testified that both he and Mr. Bouldin always considered the paper a contract or agreement and spoke of it as such (P. R. 301, 305, 308); that Bouldin came to him seeking employment on a contingent retainer basis (P. R. 302, 300); that they had no previous dealings (P. R. 301); and that he had never heard of any claim being made that the paper was a conveyance until counsel for the Santa Cruz Development Company informed him thereof the night before the deposition was taken (P. R. 305, 308).

John Watts testified that he had some form of authority from the other heirs to sign the paper in their behalf, but he could not say whether the instruments of authority were acknowledged as required by the Arizona statute (P. R. 287, 302). He also stated that he had no authority to execute an absolute conveyance (P. R. 301) and that he never told the heirs that he had executed anything but a contingent retainer contract (P. R. 304).

Indicia of Executory Contract

The paper has all the *indicia* of an executory contract. It was signed by Mr. Bouldin and by John Watts individually and as attorney in fact for the other heirs. Although executed in Santa Fe or El Paso where an officer could readily be found to take acknowledgments, it was not acknowledged by either party. It was first recorded as executed and subsequently re-recorded on a belated proof by a subscribing witness. Its character as an executory contract with power of attorney is also evident from the reading of the paper as a whole; its words of

conveyance are expressly predicated upon the performance of Mr. Bouldin's covenants, and the ultimate subject matter of division between the parties was of whatever Mr. Bouldin might secure for the Watts heirs.

Abandonment of Contract

Mr. Bouldin did nothing whatsoever under the paper. In 1885 he allied himself with Mr. Robinson, the claimant under the Hawley deed, and received some of Mr. Robinson's rights thereunder, and acted with and for him thereafter in respect to the 1866 tract. Mr. Bouldin promptly conveyed to his sons all he acquired from Mr. Robinson in the 1866 tract, and then made partitions thereof for them with Mr. Robinson.

Filing of Bill

On June 23, 1914, the day following the announcement of the first decision of the United States Supreme Court, Messrs. Watts and Davis filed their Bill herein. After a number of amendments it developed into the form filed at the opening of the trial in March, 1915.

CONTENTIONS OF PARTIES

Santa Cruz Development Company

Santa Cruz Development Company contends that it is the owner of the entire 1863 tract, except a small part thereof in the northeast corner known as the Alto mining property and which was sold at a tax sale in June, 1914. It bases its claim as follows:

1. That the deed to Hawley passed at most the overlap between the two tracts.
2. That the Bouldin paper of September 30, 1884 is an unperformed executory contract under which no title passed.
3. That the company's title, therefore, from the Watts heirs is clear and valid.
4. That whatever title passed under the Hawley deed is vested in Santa Cruz Development Company under its chain of title through Arizona Copper Estate, as the partitions between Robinson and Bouldin did not affect the 1863 tract as they were clearly of right, title and interest in the 1866 tract.

Watts and Davis

Messrs. Watts and Davis, the plaintiffs below, claimed in their Bill that they were the sole owners of the entire 1863 tract under the Hawley deed. At the trial they abandoned their contentions as to the north half of the tract; and they now claim only the south half of the 1863 tract and recognize the Robinson-Bouldin partitions. The plaintiffs make no claim to the overlap.

Bouldins

The defendants Bouldin in their amended answer claimed the north half under the Robinson-Bouldin partitions and also claimed that the Bouldin paper of September 30, 1884 was an absolute conveyance on its face. In the prayer, they asked only for the north half of the

1863 tract under the Robinson-Bouldin partitions. Their notice of appeal is devoted entirely to the refusal of the court below to give them the whole of the north half. At the trial their counsel announced that he believed the trial court's decision on the Hawley deed to be correct (P. R. 419).

The Bouldins agree with the plaintiffs on the Hawley deed; but they may also attempt to claim alternatively that if the Hawley deed did not pass the 1863 tract, then the Bouldin paper of Sept. 30, 1884 conveyed absolutely a two-thirds interest therein and that this two-thirds interest is in the Bouldin defendants.

Joseph E. Wise and Lucia J. Wise

The defendant Joseph E. Wise agrees with us that the Hawley deed passed title only to the overlap at most. He and the Ireland intervenors join with the Bouldin defendants in contending that the Bouldin paper of Sept. 30, 1884 was an absolute conveyance. Joseph E. Wise also claims that he secured title to the interest of David W. Bouldin under a sheriff's sale proceeding.

The defendants Joseph E. Wise and Lucia J. Wise may also claim title to several small parts of the 1863 tract by adverse possession. At the trial they practically abandoned such claims, recognizing that the statute of limitation as to adverse possession could not commence to run until December 14, 1914, when the plat of survey was filed.

Mr. Wise also claims an undivided one thirty-eighth interest of the whole tract through Antonio Baca, the al-

leged extra or nineteenth heir of Luis Maria Baca, but this is discussed in a separate brief.

Margaret W. Wise

Margaret W. Wise claims only an undivided one thirty-eighth interest through Antonio Baca, the alleged extra or nineteenth heir of Luis Maria Baca.

Ireland Intervenors

The Ireland intervenors claim an undivided one fifty-fourth interest in the 1863 tract as heirs and devisees of John Ireland. In the instrument of 1885 (P. R. 312) Mr. Bouldin conveyed to Messrs. Ireland and King "an undivided one-third of one-third" of all his interest in the 1863 tract, or one-ninth of whatever his interest might have been. The Ireland intervenors claim one-half of John Ireland's one-half of the one-ninth said to have been conveyed by Mr. Bouldin to Ireland and King in his alleged two-thirds interest under the instrument of September 30, 1884; this explains the one fifty-fourth fraction.

CHAINS OF TITLE

Watts and Davis

They claim under the following *quitclaim* deeds:

- (a) Numbers 1 and 2 specifically describing the 1866 tract by proper metes and bounds;

(b) Numbers 3 to 8 inclusive specifically describing the southerly half of the 1866 tract by proper metes and bounds and none of them containing the title references found in the Hawley deed;

(c) Only Number 10 containing the metes and bounds of the 1863 tract.

1. John S. Watts to Christopher E. Hawley, dated Jan. 8, 1870 (P. R. 193).
2. Christopher E. Hawley to John C. Robinson, dated May 5, 1884 (P. R. 208).
3. Partitions dated Nov. 12 and 19, 1892, "of right title and interest" between John C. Robinson on the one part, and Powhatan W. and James E. Bouldin on the other part, whereby (as we claim) Mr. Robinson received the south half of the 1866 tract by correct metes and bounds and the Bouldins the north half (P. R. 216).
4. Confirmative deed by Powhatan W. Bouldin and James E. Bouldin to Alex F. Mathews, dated Feb. 7, 1894, reciting that the land conveyed by the preceding deed was described "fully and accurately therein" and that it was the intention of the parties to the preceding deed that Mr. Robinson should have the land "included in the metes and bounds by said (preceding) deed given" (P. R. 229).
5. John C. Robinson to John W. Cameron, dated Dec. 1, 1892, for land conveyed to Mr. Robinson by preceding deed (P. R. 255).
6. Declaration of trust by John W. Cameron, dated Nov. 28, 1892, to the effect that he held the land

conveyed to him by the preceding deed in trust for John C. Robinson, Mrs. A. T. Belknap, James Eldredge, Charles Eldredge and John W. Cameron (P. R. 226).

7. Cameron beneficiaries to Alex F. Mathews, dated September, 1893 (P. R. 210, 220, 223, 226).
8. John Ireland and Wilbur H. King to Alex F. Mathews, dated Feb. 7, 1894, releasing their rights in the southerly half of the 1866 tract because of a deed or executory contract made by David W. Bouldin to them for an interest in the metes and bounds of the 1863 tract (P. R. 219).
9. John C. Robinson to Samuel A. M. Syme, dated April 30, 1896, for the northerly half of the "tract * * * known as Baca Location or Float No. 3" and followed by metes and bounds of the northerly half of the 1866 tract (P. R. 212).
10. Trust indenture by Samuel A. M. Syme, and the devisees and legal representatives of Alex F. Mathews, to Cornelius C. Watts and Dabney C. T. Davis, Jr., "Trustees," dated February 8, 1907, for the 1863 tract. *This is the only instrument in this chain which omits the metes and bounds of the 1866 tract and is the only instrument therein containing the metes and bounds of the 1863 tract* (P. R. 214).

Bouldins

The defendants Bouldin claim through John C. Robinson as follows:

1. Under deeds 1, 2 and 3 of the Watts and Davis chain, whereby (as we claim) the northerly half

of the 1866 tract was conveyed to Powhatan W. Bouldin and James E. Bouldin, and by deed No. 4 in that chain the metes and bounds of No. 3 were approved and admitted to be accurate.

2. Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894 (after the recording of Nos. 3 and 4 of the Watts-Davis chain) specifically describing the entire 1866 tract.
3. Certificate of sale by sheriff of interest of Powhatan W. Bouldin to Lionel M. Jacobs, dated June 15, 1894, and assignment to Dr. M. A. Taylor, dated December 4, 1894, specifically describing both the 1863 and 1866 tracts.
4. Lionel M. Jacobs to Dr. M. A. Taylor, dated December 4, 1894, specifically describing the northerly half of the 1866 tract.
5. James E. Bouldin to Dr. M. A. Taylor, April 25, 1895, specifically describing the north half of the 1866 tract.
6. Dr. M. A. Taylor to Daisee Belle Bouldin, November 28, 1896, specifically describing the north half of the 1866 tract.
7. Daisee Belle Bouldin and James E. Bouldin to D. B. Gracey, April 16, 1900, specifically describing the north half of the 1866 tract, conveying an undivided one-half interest, and leaving an undivided one-half interest in Daisee Belle Bouldin.
8. D. B. Gracey to James E. Bouldin, June 15, 1904, for an undivided one-half interest in a tract specifically described as the north half of the 1866 tract.

9. James E. Bouldin to Jennie N. Bouldin, June 24, 1913, for an undivided one-half of the northerly half of the 1863 tract.
10. Stipulation that the infants defendants David W. Bouldin and Helen Lee Bouldin are the sole heirs at law of Daisee Belle Bouldin, deceased (P. R. 148).

Deeds Nos. 2 to 9 inclusive are substantially in above order (Bouldin Exs. 1 to 8, P. R.).

Alternatively, the defendants Bouldin may also claim a *two-thirds* interest in the 1863 tract under the heirs of John S. Watts, although the Bouldins prayed only for the entire north half under the Robinson chain in their amended answer and expressly limited their notice of appeal to the refusal of the trial court to give them the north half under the Robinson-Bouldin partitions:

1. Instrument of September 30, 1884, to David W. Bouldin, which the Bouldins assert is an absolute conveyance of a two-thirds interest in the 1863 tract, but which we claim is only an executory contract.
2. David W. Bouldin to Powhatan W. Bouldin and James E. Bouldin, dated August 23, 1892, for all of the grantor's "right, title and interest in and to Baca Float No. 3, describing it by the metes and bounds of the" 1866 tract. This deed is not in evidence, but is set out in Section 17 of the Bill.
3. Nos. 3 to 10 inclusive in their Robinson chain. If, however, the Hawley deed did not pass the 1863 tract, these last named deeds certainly are insuf-

ficient to convey the 1863 tract or any part thereof, in so far as the defendants David W. Bouldin and Helen Lee Bouldin are concerned, but leave an interest in the defendants Jennie N. Bouldin and James E. Bouldin.

Santa Cruz Development Company

1. J. Howe Watts et al., heirs of John S. Watts, to John Watts (P. R. 411, 295, 283, 284).
2. John Watts to James W. Vroom (P. R. 412).
3. James W. Vroom to Santa Cruz Development Co. (P. R. 412).

In case the decree in No. 2663 is reversed, Santa Cruz Development Co. will also claim under the Hawley title chain, contending that the Robinson-Bouldin partitions expressly covered only the 1866 tract:

1. Mathews and Syme to The Arizona Copper Estate, dated August 3, 1899 (P. R. 413).
2. The Arizona Copper Estate to A. M. Fowler (P. R. 413).
3. A. M. Fowler to Santa Cruz Development Co. (P. R. 414).

Joseph E. Wise

The defendant Joseph E. Wise claims either a two-thirds or a thirty-five fifty-fourths interest under the heirs of John S. Watts as follows:

1. Instrument of September 30, 1884, which he claims is an absolute conveyance of a *two-thirds interest* in the 1863 tract, but which we contend is only an executory contract.

2. Conveyance by David W. Bouldin to John Ireland and Wilbur H. King of one-ninth of grantor's interest (P. R. 312).

3. Sale of interest of David W. Bouldin by the sheriff of Pima County to Wilbur H. King (P. R. 319). The validity of these proceedings is contested by the defendants Bouldin.

4. Sheriff to Wilbur H. King (P. R. 319).

5. Wilbur H. King to Joseph E. Wise (P. R. 320).

6. Corrective sheriff's deed to Joseph E. Wise (P. R. 323).

7. Mrs. A. M. Ireland to Joseph E. Wise (P. R. 323).

This is exclusive of the claim of title of the defendant Joseph E. Wise to one-half of the one-nineteenth interest which he alleges was in Antonio Baca or Jose Antonio Baca as the son of Luis Maria Baca, deceased, and is independent of the title which he may claim by adverse possession under certain homestead entries.

Ireland Intervenors

They claim an undivided one fifty-fourth interest under the heirs of John S. Watts as follows:

1. Instrument of September 30, 1884, which they allege (and we deny) to be an absolute conveyance of two-thirds interest.

2. David W. Bouldin to John Ireland and Wilbur H. King, for one-ninth of grantor's interest (P. R. 312).

3. Devolution to intervenors of one-half of John Ireland's interest, being one fifty-fourth of whole (P. R. 150).

Margaret W. Wise

She claims and was allowed an undivided one-half of the one-nineteenth interest which it is alleged was in Antonio Baca, or Jose Antonio Baca, as the son of Luis Maria Baca, deceased.

If Antonio was in fact an heir and entitled to a one-nineteenth interest in the tract, the record shows that Joseph E. Wise and Margaret W. Wise each have an undivided one thirty-eighth interest in the tract at bar.

Lucia J. Wise

She claims certain small parts by adverse possession under recent homestead entries, although it has been adjudicated that the tract at bar ceased to be public land on April 9, 1864, after which time no homestead or mineral entry could be initiated. We contend that adverse possession could not commence to run until December 14, 1914, when the official plat of survey of the tract was filed.

DECISION OF TRIAL COURT.

The court below decided that the Hawley deed on its face conveyed the whole of the 1863 tract (P. R. 417);

that Antonio Baca was in fact an heir of Luis Maria Baca; and that Joseph E. Wise and Margaret W. Wise are each entitled to one thirty-eighth of the whole under Antonio Baca.

Recognizing the Robinson-Bouldin partitions, the trial court gave the plaintiffs eighteen-nineteenths of the south half, and the Bouldins eighteen-nineteenths of the north half. These fractions were used because of the decision as to Antonio Baca.

SPECIFICATION OF ERRORS

We contend that the trial Court erred in the following particulars:

1. Admitting the indefinite and unproved title bond to Wrightson (P. R. 183) to construe a later deed to Hawley (P. R. 193).
2. Admitting the testimony of Col. Syme that he received the title bond in 1894 as part of the title papers, or in the course of or in connection with the title (P. R. 187 to 190).
3. Admitting the letter of March 27, 1864 from John S. Watts to Wrightson (P. R. 190), to construe the deed made to Hawley in 1870.
4. Deciding that the deed to Hawley passed the 1863 tract, instead of the land correctly described therein by metes and bounds, and that the Hawley deed title is in the plaintiffs and the Bouldins.
5. Rejecting the deeds from Mathews and Syme to Arizona Copper Estate (P. R. 413), from Arizona Copper Estate to A. M. Fowler (P. R. 413), and

- from A. M. Fowler to Santa Cruz Development Company (P. R. 414), which were offered to show that the plaintiffs had no title and that the title they claimed is in Santa Cruz Development Co.
6. Rejecting the testimony of John Watts (P. R. 298) that neither he nor his mother, brother or sisters received any money consideration for the instrument of September 30, 1884, and determining the real consideration therefor (P. R. 307).
 7. Rejecting the testimony of John Watts (P. R. 305, 308), that neither he nor David W. Bouldin ever regarded or referred to the instrument of September 30, 1884 in any way than as a contract or agreement, and in refusing to admit Mr. Bouldin's letter (P. R. 415) referring to the instrument as a contract or agreement.
 8. Holding that Antonio Baca was an heir of Luis Maria Baca; admitting and following the testimony of Marcos Baca that in 1873 or thereabouts he was informed by certain sons of Luis Maria Baca that Antonio was in fact a son of said Luis Maria Baca, and had died leaving issue; and decreeing that Joseph E. Wise and Margaret W. Wise by various conveyances had each an undivided one thirty-eighth of the property through the heirship of the alleged Antonio. (This branch of the case is discussed in a separate brief.)
 9. Not decreeing that Santa Cruz Development Company had the sole title to the property at bar (with the exception of a very small part in the northeast corner, known as the Alto mining property, and

sold at a tax sale (June, 1914), and in not quieting the title of Santa Cruz Development Company as aforesaid.

ANALYSIS OF THE BILL

The Bill reads like one in an action to reform a deed, but concededly this action is only to quiet title and not to obtain any reformation.

The necessity for reforming the Hawley deed before any claimant thereunder can succeed in this action (except possibly as to the overlap between the two tracts) is demonstrated by the seventh, eighth, ninth and twenty-third sections of the Bill. According to our understanding, Messrs. Watts and Davis make no claim on this appeal to the overlap.

Seventh Section

The seventh section alleges that between 1866 and 1899,

“all persons interested, including the Land Office, believed that Baca Float No. 3 was described by the metes and bounds of the so called amended location of 1866.”

The succeeding sentence as to the survey has no application, as no one has ever believed that both locations covered the same ground.

Eighth Section

The eighth section states that John S. Watts

“intended to and did convey to Christopher E. Hawley by the deed of January 8, 1870, Baca Float No. 3 as the same is described in” the metes and bounds of the 1863 tract “as appears by the express terms of said deed; * * * and the description by metes and bounds (of the 1866 tract) * * * was used under the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float.”

This section admits that the parties believed the 1866 tract to be Baca Float No. 3, or at least one location thereof, and that they knew the 1866 tract was actually conveyed by the Hawley deed. In spite of this, plaintiffs allege that John S. Watts, by the Hawley deed, “did convey” the 1863 tract by a deed in which the metes and bounds of another tract were knowingly used.

Necessity for Reformation

The eighth section of the Bill also demonstrates that the Hawley title claimants can find relief only in an action for reformation, in which (unless barred by laches and limitation) Hawley could seek to reform his deed so as to make it convey what plaintiffs allege it was “intended” to convey, instead of conveying what the parties

knew it actually conveyed, "under the mistaken belief" referred to in the Bill. Of course Hawley's right to that relief could not pass under a conveyance of the land which he actually received but the right to reformation would be in Hawley alone (*Norris v. Colorado Company*, 43 Pac. 1024; 22 Colo. 162; and cases cited).

Furthermore, the "mistaken belief" was clearly one of law for which no relief can be given.

Plaintiffs' allegations were denied by us in a verified responsive answer and there is no *proof* that either party had any "mistaken belief."

Plea of Limitations

In our amended answer we plead laches and limitations against any reformation of the Hawley deed. As this Court takes judicial notice of the decisions and statutes of every state and territorial court, irrespective of where the action is tried, we need not cite authorities or statutes to prove that limitation and laches now bar any attempt to reform a deed executed in 1870.

Resort to Title Bond

The ninth section sets out the alleged title bond. In the twenty-third section it is alleged that the Watts heirs because of the title bond and the Hawley deed had no title to convey. This is a tacit admission that the Hawley deed, without the widest possible inference from the Wrightson title bond (which by the way described no

property and is not connected with Hawley), is insufficient to pass the 1863 tract, and demonstrates the necessity for reformation.

REJECTED DEEDS

The second, third, fourth and fifth assignments of error relate to the rejection of deeds which show that the plaintiffs have no title. These grew out of the transaction of August 3, 1899, wherein Messrs. Mathews and Syme (from whom the plaintiffs acquired title) previously conveyed to the Copper Estate. The record shows the admitted purport of the rejected deeds (P. R. 413, 414).

Plaintiffs Must Prove Title

In case the decree in No. 2663 is reversed, there is manifest error in the rejection of the deed from Mathews and Syme to The Arizona Copper Estate; that deed demonstrates that Messrs. Watts and Davis had no title, as in 1907 there was none in their grantors.

Plaintiffs in an action to quiet title must prove in themselves a legal title, and they must succeed on the strength of their own title and not on the weakness of that of their adversaries (*Dick v. Foraker*, 155 U. S. 414; and many other cases).

Section 24 of the original Bill (P. R. 25) sets out the Copper Estate transaction. This section was amended out but copied in the record to show that the plaintiffs had knowledge of the transaction.

Irrespective, however, of any question of pleading, we had the undoubted right under our denial of plaintiffs' title (P. R. 37) to show in any way that they had no title (32 Cyc. 1359).

Rejected Deeds Admissible Under Our Answer

In our amended answer we denied the plaintiffs' title; and we claimed title to the entire 1863 tract with the exception of a small part thereof in the northeast corner known as the Alto mining property, sold in June, 1914, at a tax sale. Consequently, we were entitled to substantiate our answer by any deeds in our possession without being required to plead each of them (32 Cyc. 1351, 1359).

We, therefore, had the right to offer in evidence the deeds from Mathews and Syme to The Arizona Copper Estate, from Arizona Copper Estate to A. M. Fowler, and from A. M. Fowler to Santa Cruz Development Company.

Necessity of Offering Deeds

Furthermore, it must be noted that if we had not offered the deeds, any decree against us herein would bar us from all claim to the property under the unoffered deeds, even if the decree in No. 2663 should be reversed. As we would be barred against asserting title under the rejected deeds in case we did not offer them, we certainly had the right to offer them; and the fact that they are the subject of another action is immaterial.

No Necessity for New Trial

As the rejected deeds are in fact in the record, this Court can do full justice between parties, without ordering a new trial.

WRIGHTSON TITLE BOND

Our sixth and seventh assignments of error as filed relate to the alleged title bond from John S. Watts to William Wrightson (P. R. 183), and the testimony with reference thereto (P. R. 187 to 190).

The paper contains no reference to the land involved herein. Furthermore there is not the slightest proof or allegation of any assignment from Wrightson to Hawley, nor any proof of the signature of John S. Watts.

Evidence

The only evidence with reference to the instrument is that in 1894 James Eldridge handed to Col. S. A. M. Syme a satchel of papers and that this instrument was later found in that satchel (P. R. 187 to 190). Neither Mr. Eldredge nor Col. Syme was then interested in the title and no comment was made by Mr. Eldredge about the instrument. The failure to connect the instrument is self-evident.

Inadmissible Without Proof

There is no Arizona or Federal statute (and certainly no rule of evidence) allowing a Federal equity court to

receive a contract in evidence, without proof of execution, on an acknowledgment taken outside of Arizona in 1864, especially where (as in this case) there is no proof of the Notary's authority to take acknowledgments. "No (Arizona) statute is retroactive unless expressly so declared therein" (*Ariz. Code of 1913*, Sec. 5550); and section 1746 of that Code, which may be cited against us, clearly contemplates only future acknowledgments.

Not Admissible as an Ancient Document

The paper cannot be proved as an ancient document:

1. The signature of John S. Watts could readily have been proved by any one of his four living children;
2. Its subject matter is uncertain;
3. It has never been recorded nor in any way brought to the attention of adverse parties so as to establish it by their silence;
4. Its present custody is not in any way connected with Wrightson;
5. As the title bond did not run to Hawley, the present custody is as consistent with a cancellation of the instrument as with an assignment of it;
6. No act or possession thereunder has been shown;
7. There is no evidence apart from its custody that it related to the property in suit.

See *Wilson v. Snow*, 228 U. S. 217.

Mere custody of an ancient *private* document is not sufficient proof of its genuineness.

Certainly mere custody does not prove the *subject matter* of the instrument; and without proof of subject matter, it was inadmissible even if its *genuinesss* were proved as an ancient document.

Effect of Reliance on Title Bond

The reliance on the alleged title bond is a confession that the Hawley deed alone is not sufficient to convey the 1863 tract. This demonstrates that the deed requires reformation.

As the plaintiffs disavowed any desire for reformation, they have demonstrated, by their reliance upon the alleged title bond, that they cannot have quieted herein a title which they tacitly confess the Hawley deed alone does not convey.

Purpose of Offer

The title bond, and the testimony with reference thereto, were offered simply to *give the impression* that John S. Watts sold the 1863 tract before its location to William Wrightson and that in some way Hawley succeeded to the latter's rights.

As this is not an action to reform the Hawley deed, neither the title bond nor the testimony was competent.

Deed extinguishes executory contract

A deed extinguishes an executory contract for the conveyance of real property; and the deed is the sole in-

strument from which the intention of the parties and the extent of the conveyance can be ascertained.

Parker v. Kane, 22 How. (U. S.) 1, 18;

Van Ness v. Washington, 4 Pet. (29 U. S.)
232, 284;

Martin v. Waddell, 16 Pet. 367, 416;

Prentice v. N. P. R. R. Co., 154 U. S. 163;
where the negotiations and the collateral evidence of intent (pp. 166 to 169) were not considered by the Court, which "looked into the deed * * * for the intentions of the parties."

Potomac Steamboat Co. v. Upper Potomac Co.,
109 U. S. 672, 680, 681;

Carter v. Beck, 40 Ala. 599;

Bryan v. Swain, 56 Cal. 616;

Thorndike v. Richards, 13 Me. 430;

Clifton v. Jackson Iron Co., 41 N. W. 891; 74
Mich. 183; 16 Am. St. Rep. 621, with mono-
graphic note;

Turner v. Cool, 23 Ind. 56; 85 Am. Dec. 449;

Hempe v. Higgins, 85 Pac. 1019; 74 Kan. 296;

Horner v. Love, 64 N. E. 218; 159 Ind. 406;

Cronister v. Cronister, 1 W. & S. (Pa.) 442.

Jones v. Wood, 16 Pa. 25

Analysis of title bond

An examination of the alleged title bond will show:

1. It was dated before the 1863 tract was selected;
it describes no particular property nor anything

from which a description can be supplied, and it cannot be connected with either selection of Baca Float No. 3. There were five locations under the Act of 1860, and several of them had more than one selection. Subsequently John S. Watts became the owner of four of the five locations.

2. Location No. 5 as well as Location No. 3 was "unlocated" at the date of the paper (P. R. 409).
3. Wrightson died before the 1866 tract was selected (P. R. 176) by John S. Watts as attorney for the Baca heirs. The conveyance of that tract to Hawley was clearly an independent transaction.
4. There is neither allegation nor the slightest evidence of any assignment by Wrightson to Hawley.
5. The first appearance of the paper is in 1894 (P. R., 189) and the plaintiffs allege only that they are now in possession of it (P. R. 8).
6. There was a lapse of seven years between the contract and the deed and many modifications can be made in an executory contract in that length of time. Over fifty years have passed since the contract was made and no Court could now say that it was not fully and correctly performed (*Van Ness v. Washington*, 4 Pet. (29 U. S.) 232, 284 supra).
7. There has never been any complaint by Wrightson or Hawley that the deed was not a proper execution of any alleged contract.
8. The contract itself did not pass title to the 1863 tract because:

- a. That location had no existence at that time.
 - b. The instrument can refer to Location No. 5 as well as Location No. 3 (P. R. 409), both of which were "unlocated" on March 2, 1863; and also to Location Nos. 2 and 4 which John S. Watts acquired with Location No. 3 on May 1, 1864 (P. R. 154), and to the second selection of Location No. 5 which he acquired on May 30, 1871 (P. R. 197).
 - c. The instrument contemplated a future conveyance (See authorities cited on p. 85 as to the Bouldin paper).
 - d. The instrument called for a location by Wrightson; he did not make the location of June 17, 1863, and never sought to have any trust impressed thereon.
9. There is not the slightest proof of its execution and there is no warrant for its reception in evidence on the purported acknowledgment in 1864; and the clerk's certificate does not set forth that the Notary Public was authorized to take acknowledgments.

LETTER FROM JOHN S. WATTS TO WILLIAM WRIGHTSON

Our eighth assignment of error as filed relates to the alleged letter from John S. Watts to William Wrightson, dated March 27, 1864, with the endorsement thereon, and known as "Plaintiffs' Exhibit M" (P. R. 190).

The copy offered was neither the original nor certified. It was simply an uncertified typewritten copy of an ambiguous letter which appeared in the Record in the case of *Lane v. Watts*.

Not admissible under stipulation

Under a stipulation (P. R. 118), every party herein was allowed to offer in evidence without authentication certain papers in the record in *Lane v. Watts*, but there is nothing in the stipulation covering a letter from one private individual to another. The stipulation was carefully limited, and drawn with the intent to exclude this particular letter unless it was authenticated or proved; the signature to the letter in the Land Department files does not in any way correspond with the signatures of John S. Watts which we have seen.

Notation inadmissible

The copy of the notation made on the paper by a clerk in the Land Office is clearly inadmissible; besides, it shows that the letter was apparently received on May 26, 1864, some time after the Commissioner had finally acted on April 9, 1864, with reference to the 1863 tract.

Conclusion

There is no connection shown between Wrightson and Hawley; neither the letter nor the notation proves its

subject matter and the letter is fully consistent with a representative relation.

The trial Court clearly erred in admitting the letter and the notation. After a lapse of fifty years, ambiguous, unauthenticated copies are open to every suspicion and should be most carefully scrutinized.

RULE FOR CONSTRUCTION OF DEEDS

The rules for the construction of deeds are rules of property and the security of titles demands a rigid observance thereof.

The construction of the deeds through which Messrs. Watts, Davis and the Bouldins claim title is governed, both at law and in equity, by the following rules:

Intent must be found in deed

It is the duty of the Court to declare the meaning of what was written in the instrument, not of what was intended to be written. Nothing passes by a deed except what is described in it, whatever the intention may have been.

Guilmartin v. Wood, 76 Ala. 204 209;

Coleman v. Manhattan Beach Co., 94 N. Y.
229, 232;

Gaddes v. Pawtucket Savings Institution, 33
R. I. 177, 186; 80 Atl. 415, 418;

Hartmyer v. Everly, 79 S. E. 1093, 1095; W.
Va.;

Collins v. Degler, 82 S. E. 265, 266; W. Va.;
Cassidy v. Charlestown Savings Bank, 21 N. E.
 372; 149 Mass. 325;
 17 *A & E. Ency. Law* (2nd Ed.) 3;
 17 Cyc. 616 to 619.

The written intent controls, and not a "conjectural intent."

Van Ness v. Washington, 4 Pet. (29 U. S.) 232,
 285;
Polomac Co. v. Upper Potomac Co., 109 U. S.
 672, 680, 681.

Construction of Descriptions

"Where the grantor in a deed owns lands which comply with all the particulars of the description, the deed passes title to those lands only, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description."

"In arriving at the false description which is to be rejected, the rule is that a (definite) particular or specific description will control a general or implied description, in whatsoever order they may appear."

4 *A & E. Ency. Law* (2nd Ed.) 799, 800.

Conflict between General and Specific Descriptions

In case a definite specific description by metes and bounds conflicts with title references or general words of description, then the specific description prevails, irrespective of whether the general description or the statement of the source of title precedes or follows the specific description. Such is the rule not only in the United States Courts but in every state court in which the question has been presented for decision.

4 *A & E. Ency.* (2nd Ed.) 799c;

5 *Cyc.* 926;

Washburn on Real Property (6th Ed.), Sec. 2318;

Tiedeman on Real Property (2nd Ed.), Sec. 829;

Bock v. Perkins, 139 U. S. 628, 634;

Prentice v. N. P. R. R. Co., 154 U. S. 163;

Prentice v. Stearns, 113 U. S. 435;

Parker v. Kane, 22 How. 1;

Howard v. Saule, Fed. Cases No. 6782; 5 Mason 410; Story, J.;

Coppermines Co. v. Comins, 148 Pac. 349; Nev.

Raymond v. Coffey, 5 Ore. 132, 135;

Piper v. True, 36 Calif. 606, 619;

Guilmartin v. Wood, 76 Ala. 204, 210;

Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 325;

Whiting v. Dewey, 15 Pick. (Mass.) 428, 434;

- Crabtree v. Miller*, 80 N. E. 225; 194 Mass. 123;
- Dana v. Middlesex Bank*, 10 Met. (51 Mass.) 250;
- Muto v. Smith*, 55 N. E. 1041; 175 Mass. 175;
- Dow v. Whitney*, 16 N. E. 722; 147 Mass. 1;
- Tyler v. Hammond*, 28 Mass. (11 Pick.) 193;
- Hamlin v. Attorney General*, 81 N. E. 275; 195 Mass. 309;
- Lovejoy v. Lovett*, 124 Mass. 270;
- Jones v. Smith*, 73 N. Y. 205;
- White's Bank v. Nichols*, 64 N. Y. 65;
- Sherman v. McKeon*, 38 N. Y. 266;
- Burnett v. Wadsworth*, 57 N. Y. 634;
- Texas Ry. Co. v. Scott*, 129 S. W. 1170, 1178; Texas;
- Schaffer v. Heidenheimer*, 96 S. W. 61; Texas C. A.;
- Ridgell v. Atherton*, 107 S. W. 129, 132; Texas C. A.;
- Cullers v. Platt*, 16 S. W. 1003; 81 Tex. 258;
- Tate v. Betts*, 97 S. W. 707; Tex.;
- Poggess v. Allen*, 56 S. W. 195; Texas;
- Bender v. Chew*, 56 South. 1023; 129 La. 849;
- Hannibal v. Green*, 68 Mo. 168;
- Pendergras v. Butcher*, 164 S. W. 949, Ky.;
- Smith v. Sweat*, 38 Atl. 554; 90 Me. 528;
- Cochrane v. Harris*, 84 Atl. 499; 118 Md. 295;
- Gaddes v. Pawtucket Inst.*, 80 Atl. 415; 33 R. I. 177;

- Wharton v. Brick*, 8 Atl. 529; 49 N. J. Law
289;
- Cummings v. Black*, 25 Atl. 906; 65 Vt. 76;
- Carter v. White*, 7 S. E. 473; 101 N. C. 30;
- Osteen v. Wynn*, 62 S. E. 37; 131 Ga. 209;
- Shackelford v. Orris*, 59 S. E. 772; 129 Ga. 791;
- Baltimore B. & L. Assn. v. Bethel*, 27 S. E.
29; 120 N. C. 344;
- Pardee v. Johnson*, 74 S. E. 721, 723; 70 W. Va.
347;
- Glenn v. Augusta Co.*, 40 S. E. 25; 99 Va. 695;
- Nichols v. N. E. Furn. Co.*, 59 N. W. 155; 100
Mich. 230;
- Nutting v. Hurbert*, 35 N. H. 120;
- Woodman v. Lane*, 7 N. H. 241;
- Barnard v. Martin*, 5 N. H. 536;
- Thorndike v. Richards*, 13 Me. 430;
- Brunswick Savings Inst. v. Crossman*, 76 Me.
577;
- Gano v. Aldridge*, 27 Ind. 294;
- McEowan v. Lewis*, 26 N. J. Law. (2 Dutch)
451;
- Wright v. Mabry*, 9 Yerk. (17 Tenn.) 55;
- Fletcher v. Clark & Burton*, 48 Vt. 211;
- Spiller v. Scribner*, 36 Vt. 245;
- Morrow v. Willard*, 30 Vt. 118;
- Benedict v. Gaylord*, 11 Conn. 332; 29 Am.
Dec. 299.

Illustrative Cases

Prentice v. N. P. R. R. Co., 154 U. S. 163. This case has striking similarities to that at bar. The deed was the same as in *Prentice v. Stearns*, 113 U. S., 435 and it is printed in full on pages 440 and 441 of the latter case. It was a quitclaim deed for a half interest in a tract of land one mile square, described by metes and bounds, and concluding:

“Being the land set off to the Indian Chief Buffalo at the Indian Treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to said Armstrong (the grantor) and is now recorded with the Government documents.”

At the time of the deed the land specifically described had not in fact been officially set off, but the grantor had a transfer of the rights of Chief Buffalo who had made a selection in general terms in the locality of the specific description. The grantor then had no other land or land rights in the same county; and later he admitted that he intended to convey his general rights and not the specific tract. The deed was not executed in the locality of the property.

The Court held:

1. The specific description controlled and furnished the best evidence of the intention of the grantor (p. 173), although the land therein was largely under the waters of Lake Superior.

2. The quoted references referred only to the specific description and did not convey the lands subsequently allotted to Armstrong in lieu of the land selected by Buffalo.
3. The references only gave the sources of title and were not to be considered as an independent description, even through the recited instruments conveyed the much desired general rights.
4. Even if considered as a general description the title references could not control the specific description (p. 173).
5. The deed was for a definite tract of land with a fixed beginning point and not of the grantor's general rights.
6. If a transfer of general rights or of any subsequently approved location had been intended instead of the specific tract the deed should have so stated (p. 175).

The Court in distinguishing this case from two cases wherein there had been no selection of specific tracts said:

“In the case before us, not only had Buffalo made this selection and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically; and which Armstrong undertook to convey specifically.”

By comparing the *Prentice* cases with those cited in the opinion of the Court therein and with the case of *Piper v. True*, 36 Cal. 606, chiefly relied upon by Senator Root and Judge Dillon, counsel for the unsuccessful party, it will be seen that where a grantor conveys *by*

metes and bounds lands selected under a statute or treaty, his deed will cover only the metes and bounds and not the land subsequently allotted, in spite of references in the deed to his source of title or the name of his grant, even though his right to the specific land had not fully vested or thereafter failed.

Bock v. Perkins, 139 U. S. 628. A deed of general assignment, after reciting an intention to make distribution of debtor's property among creditors, conveyed

“all the lands * * * of the said party of the first part, more particularly enumerated and described in * * * Schedule A, *or intended so to be.*”

The deed was limited by the Court to the items in the schedule or specific description.

Parker v. Kane, 22 How. (U. S.) 1. The deed conveyed an undivided fractional interest in,

“lots 1 and 6, being that part of the N. E. $\frac{1}{4}$ lying E. of the Milwaukee river, etc.”

The deed was limited by the Court to lots 1 and 6, although the grantor and grantee had been jointly interested in “that part of the N. E. $\frac{1}{4}$ lying E. of the Milwaukee river,” and the parties evidently intended the deed to be a statement of their interests therein. The Court said that the description by lot numbers was a complete identification of the land and that everything inconsistent therewith must be rejected.

Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 325. The grantor conveyed by metes and bounds a lot which he did *not* own, which adjoined one that he *did* own, and then referred to the deed which correctly described the lot which he did own. The Court (Mr. Justice Holmes, now of the United States Supreme Court, concurring) held the instrument to the specific description.

Guilmartin v. Wood, 76 Ala. 204. This case is noteworthy for its succinct statement of the rule:

“General words of description cannot override a particular description. It is a principle long and well settled, that where a conveyance describes the premises by clear and definite metes and bounds from which the boundaries can be readily ascertained, such description shall prevail, and determine the boundaries and location, over general words of description (citing authorities.) The presumption is, the grantor intended to convey the land thus clearly and particularly designated.”

Coppermines Co. v. Comins, 148 Pac. 349 (Nev., 1915).
The deed conveyed

“all those parcels of land * * * commonly known as and called the Comins Ranch, and more particularly described” by enumerated legal subdivisions, “containing 1,600 acres more or less.”

It was held to the particular description; and a long contiguous strip of about 65 acres was excluded, although included within the fences of the ranch.

Dana v. Middlesex Bank, 10 Met. (51 Mass.) 250. This case has been frequently cited. The deed, after a description by metes and bounds, stated that the lots were the same set off in certain partition deeds, "or however either of said pieces of land may be bounded"; but the Court said:

"the description by metes and bounds is to prevail, although a different description is given by reference to the grantor's title deeds."

Muto v. Smith, 55 N. E. 1041; 175 Mass. 175. A mechanic's lien for improving realty, instead of describing the parcel on which the work was done, described the rest of the premises, "being the same premises described in deed" to owner, which covered both parcels, and in a mortgage which covered only the land specifically described. The opinion written by Mr. Justice Holmes (now of the United States Supreme Court) held that even if the title references had agreed, they would not override the specific description, although the work described in the notice of lien had been done on the omitted parcel; and that the *falso demonstratio* rule did not apply.

Mention of Tract Name.

Where land is conveyed by its name and also by specific boundaries, the latter will control, except in extraor-

dinary cases where the conveyance is expressly and primarily of an entire island, or other tract of shifting or indefinite boundaries, and not of metes and bounds thereof which are stated to be "*known as*" the tract or island in question.

An example of the exceptional cases is found in *Lodge v. Lee*, 6 Cranch 237, which was a conveyance of an island as such, followed by an attempt at specific boundaries; naturally the Court held that the island itself was intended to be conveyed and not the particular metes and bounds of the island, as their relation to the island changed hourly with the rise and fall of the water.

These principles are demonstrated by a comparison of *Lodge v. Lee*, supra, with the following cases:

- Carter v. White*, 7 S. E. 473; 101 N. C. 30;
Coppermines Co. v. Comins, 148 Pac. 349;
Guilmartin v. Wood, 76 Ala. 204;
Ostecn v. Wyn, 62 S. E. 37; 131 Ga. 209;
Baltimore B. & L. Assn. v. Bethel, 27 S. E. 29;
 120 N. C. 344;
Fletcher v. Clark, 48 Vt. 211;
Woodman v. Lane, 7 N. H. 241;
Thorndike v. Richards, 13 Me. 430;
Jones v. Smith, 73 N. Y. 205;
Burnett v. Wadsworth, 57 N. Y. 634;
Glenn v. Augusta B. & L. Co., 40 S. E. 25; 99
 Va. 695;
Tyler v. Hammond, 28 Mass. (11 Pick.) 193.

Where the tract name clause is parenthetical to the specific description or follows it as a general state-

ment, then it is subordinate to the specific description and simply refers thereto (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 174).

If, however, there are two tracts of land by the same name, a conveyance of the metes and bounds of one of them does not convey the other tract of the same name (*Russell v. Trustees*, 1 Wheat. 432, 437).

Wherever a conveyance by tract name has been held superior to the metes and bounds thereof, it has been done to supply deficiencies in specified boundaries, and not to convey an entirely different tract or another tract of the same name.

Effect of Subsequent Change of Situation

A description is construed in the light of circumstances actually existing at the time of its use.

This is best illustrated in three interesting cases where the same description was used in successive deeds; but, owing to a change in location of monuments, street lines or neighboring ownership, a later description was held to have a meaning different from the identical description in the prior deeds.

White's Bank v. Nichols, 64 N. Y. 65, 72;

Sherman v. McKeon, 38 N. Y. 266;

Smith v. Sweet, 38 Atl. 554; 90 Me. 528.

Appurtenance Rule

“Of two tracts of land one can never be appurtenant to the other, for though the possession of the

one may add greatly to the benefit derived from the other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other. * * * All that can be reasonably claimed is that the word 'appurtenances' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created."

- Humphreys v. McKissock*, 140 U. S. 304, 314;
Harris v. Elliott, 10 Pet. (U. S.) 25, 54;
New Orleans P. R. R. Co. v. Parker, 143 U. S. 42;
Jones v. Johnston, 18 How. (U. S.) 155;
Woodhull v. Rosenthal, 61 N. Y. 382, 390;
Donnell v. Humphreys, 1 Montana 518, 525;
Jackson v. Hathaway, 15 Johns. 447; 8 Am. Dec. 263;
Leonard v. White, 7 Mass. 6; 5 Am. Dec. 19;
Riddle v. Littlefield, 53 N. H. 503; 16 Am. Rep. 388;
Griffiths v. Morrison, 106 N. Y. 165;
Ogden v. Jennings, 62 N. Y. 526, 531;

A fee title to land never passes as an appurtenance to other land. An appurtenance is a mere incorporeal hereditament, a mere easement over or servitude upon other land of the grantor, absolutely necessary for the grantee to have in order to enjoy the land actually granted; and the right exists only to the extent of the necessity therefor and never passes the fee of the servient estate.

Falso Demonstratio Rule

Where the specific description correctly describes a tract of land, it cannot be rejected as false, except in an action to reform the deed.

The *falso demonstratio* rule never applies where the specific description correctly describes some tract (*Washburn on Real Property*, 6th Ed., sec. 2319; *Tiedman on Real Property*, 2nd Ed., sec. 829). It is only applicable where there is a self-evident mistake or deficiency in some detail of course or distance which unless disregarded would render the instrument meaningless. It is applied only when by the inclusion of the *falso demonstratio* the deed would convey nothing, but by the exclusion it would convey some definite land (*Broom's Legal Maxims*, 7th Ed., p. 63/).

If through inadvertence the *wrong tract* has been described, the grantee must have the deed reformed (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 176).

A well ascertained beginning point cannot be disregarded as a *falso demonstratio* so as to make the deed cover another tract of land.

Prentice v. N. P. R. R. Co., 154 U. S. 163, 173, 175;

Russell v. Trustees, 1 Wheat. 432, 436, 437;

Davis v. George, 134 S. W. 326; 104 Tex. 106;

Muto v. Smith, 55 N. E. 1041; 175 Mass. 175;

Cassidy v. Charlestown Savings Bank, 21 N. E. 372; 149 Mass. 525.

Recitals Import Notice

Title references in a deed put a grantee on inquiry and constructive notice of the contents thereof; and the grantee is conclusively presumed to know all that an examination of the recited title references would have disclosed.

- Devlin on Real Estate Deeds* (3rd Ed.) Sec. 1000 to 1004;
Brush v. Ware, 16 Pet. 93, 111 to 113;
U. S. v. Maxwell Land Grant Co., 21 Fed. 19, 24 (Opinion by Brewer, J.);
Simons Co. v. Doran, 142 U. S. 417, 437 to 439;
U. S. v. San Pedro Co., 17 Pac. 337, 401; 4 N. M. 225; aff'd in 146 U. S. 120, 139. . . .

Practical Construction

The practical construction of a deed by the parties thereto is of very great weight in construing any ambiguity therein. "Tell me what you have done under your deed and I will tell you what the deed means."

- Lowry v. Hawaii*, 206 U. S. 206, 222;
Irvin v. U. S., 57 U. S. (16 How.) 513, 523, 524;
Steinbach v. Stewart, 11 Wall. 566, 576;
Topliff v. Topliff, 122 U. S. 121, 131;
Van Ness v. Washington, 4 Pet. (29 U. S.) 232, 284;
Blumenthal v. Blumenthal, 158 S. W. 648, 652;

251 Mo. 693;
Collins v. Deglar, 82 S. E. 265 (W. Va. 1914);
Blais v. Clare, 92 N. E. 1009; 207 Mass. 67.

The best evidence of the grantee's construction of a deed is the possession which he took under it.

Summary

The foregoing rules as to the construction of deeds may be summarized as follows:

1. A deed is conclusively presumed to express fully the intention of the parties.
2. In construing a description, an endeavor must first be made to find land which will answer the metes and bounds and the general calls.
3. In case definite metes and bounds conflict with title references or general words of description, then the metes and bounds prevail.
4. In a conveyance of a tract by metes and bounds, with a statement that it is "known as" or by a certain name, the description by metes and bounds prevails in case of any discrepancy.
5. The construction of a deed is not affected by a subsequent change of situation by which some other tract becomes "known as" or by the same name as the tract specifically conveyed.
6. A fee title to land never passes as an appurtenance to other land.
7. The *falso demonstratio* rule never applies where the specific description clearly describes a tract in

which the grantor had or was supposed to have an interest.

8. The recitals in a deed put a grantee on inquiry and constructive notice as to everything which an investigation thereof would determine.
9. The practical construction of a deed by the parties and their representatives in interest, and the possession taken thereunder, is of great weight in construing any ambiguity therein.

APPLICATION OF RULES TO INTER-MEDIATE DEEDS

These rules are readily applied to the deeds in the chain of title under the Hawley deed.

Every deed in that chain of title (see page 15 herein), from the Hawley deed to and including the deed to Watts and Davis, is a *quitclaim* deed; and every deed therein, except the deed to Watts and Davis, has as a specific description only the metes and bounds of the 1866 tract or a half thereof.

The intermediate deeds contain no statement of the manner in which John S. Watts acquired his title. Their description consists simply of the metes and bounds of the 1866 tract or a half thereof, "said tract being known as Location No. 3 of the Baca series." Most of the deeds also give the Santa Rita Mts. as the locality; and some even state specifically that the metes and bounds are correct.

The claimants under the Hawley deed must, therefore, prove that a description by metes and bounds of the 1866

tract in the Santa Rita Mts., "said tract being *known as* location No. 3 of the Baca Series," conveys on its face the 1863 tract, which is not in the Santa Rita Mts., and was not then "*known as* location No. 3 of the Baca series."

We contend that inasmuch as the metes and bounds in the Hawley chain correctly describe a tract of land then in fact "known as Location No. 3 of the Baca Series," and in which tract John S. Watts had some quitclaimable interest in 1870, they can be rejected only in an action to reform, and concededly this is not such an action.

Prior Conveyance by Plaintiffs' Grantors

Messrs. Watts and Davis acquired title under a trust indenture from Samuel A. M. Syme and the heirs of Alex. F. Mathews, dated February 8, 1907, and recorded on March 20 1914.

Prior thereto Messrs. Mathews and Syme had conveyed all their interest in the property to The Arizona Copper Estate by deed dated August 3, 1899, and recorded on August 12, 1899 (P. R. 413).

If the decree in No. 2663 in this Court is reversed, Col. Syme and the heirs and legal representatives of Alex. F. Mathews had no title to convey to Watts and Davis, and, therefore, the latter have none in any event.

Deeds to Alex F. Mathews

Alex F. Mathews acquired his title by a number of quitclaim deeds dated in September, 1893. The identical

description appears in all of those deeds and is as follows:

“All of his right, title and interest in that certain tract of land * * * which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand acres more or less, the said southern half thereby conveyed * * * contains fifty thousand acres more or less, and is bounded as follows:” (Here follows description by metes and bounds of the southern half of the 1866 tract.)

Counsel for Watts and Davis ask the Court to disregard the metes and bounds of the 1866 tract, leaving as the description:

“all that certain tract of land which is the southern half of the tract of land *known as* Baca Float No. 3.”

Section Seven of the plaintiffs' Bill avers that between 1866 and 1899 the 1866 tract was believed to be Baca Float No. 3; consequently it was then “known as Baca Float No. 3.” It is undisputed that at the time of the deeds in question the 1866 tract was in fact “known as Baca Float No. 3” and appeared on the maps as such

The deeds, therefore, convey just what they describe in metes and bounds—the southerly half of the 1866 tract.

On February 7, 1894 (P. R. 229), Mr. Mathews took a confirmatory deed from the Bouldins reciting that the grantors by deed dated November 12, 1892,

“did convey to John C. Robinson a certain tract of land * * * known and described *fully and accurately* in said deed, and which is *known as* the lower or southern half of a tract of land *known as* Location No. 3 of the Baca series *in the Santa Rita Mts.,*” and the intention of the parties that Mr. Mathews should have the entire 50,000 acres “by said deed described and conveyed *and included in the metes and bounds by said deed given*”;

and the Bouldins again conveyed to Mr. Mathews by the identical description of the deeds taken by him in 1893. There is a clear intention in this deed to take only the metes and bounds of the southerly half of the 1866 tract “in the Santa Rita Mts.,” far removed from the southerly half of the 1863 tract.

The petition presented to the Secretary of the Interior in 1901, signed by Mr. Mathews and by Conrad H. Syme, his attorney, shows unmistakably that Mr. Mathews and his predecessors knew that they were acquiring only the 1866 tract (P. R. 396) and there is no allegation nor proof herein that there was any error or “mistaken belief” of any kind in these deeds.

Deed to S. A. M. Syme

After making quitclaim partition conveyances of the northern half of the 1866 tract to the Bouldins, Mr. Robinson, on April 30, 1896 (P. R. 212), quitclaimed to Col. Syme:

“All of his right, title and interest in and to a certain tract or body of land * * * containing some fifty thousand acres more or less and described as follows, viz: the upper or north half of a tract of land of some one hundred thousand acres more or less *known as* Baca Location of Float No. 3, and bounded as follows:”

(Here follows a description by metes and bounds of the north half of the 1866 tract.)

In their Bill the plaintiffs carefully and elaborately set forth the reasons why this deed in fact passed some title to Col. Syme.

Under stress of circumstances the plaintiffs abandoned at the trial their efforts to set aside the partition between Mr. Robinson and the Bouldins, and now claim that this deed passed no title.

Deed from Robinson to Cameron

In this deed, dated December 1, 1892 (P. R. 255), Mr. Robinson quitclaimed:

“All his right, title and interest in and to that certain tract of land * * * the same being the south half of the tract of land *known as* Baca Float No. 3 * * * the said southern half of said tract of land having been conveyed to the said party of the first part by deed of partition * * * dated November 12, 1892, bounded and described as follows:”

(Here follows the description by metes and bounds of the southern half of the 1866 tract.)

The comments made on the deeds to Mr. Mathews apply with equal force to this deed.

Robinson-Bouldin Partitions

The final partition between Mr. Robinson and the Bouldins was made by interchanging two deeds, one dated November 12, 1892 (P. R. 216), to Mr. Robinson and the other dated November 19, 1892 (P. R. 400) to the Bouldins. These deeds recite another partition by deeds (not in evidence herein) dated June 28, 1892 and August 22, 1892, whereby the parties had conveyed to each other,

“One undivided one-half interest in all their right, title, property claims and demands, whatsoever, from whatever source derived and in whatever manner acquired in, and to a certain tract of land situate, lying and being in the *Santa Rita Mts.* * * * bounded and described as follows, viz:”

(Followed by the metes and bounds description of the 1866 tract.)

“The said tract of land being *known as* Location No. 3 of the Baca Series.”

It was then set forth that

1

“In order to make a full, perfect and absolute partition of the above described premises, and in order that each of the said parties * * * may

hold their share under the above described deeds in severalty," the Bouldins conveyed to Mr. Robinson "one-half of the above described premises bounded and described as follows:"

(Followed by the description by metes and bounds of the southern half of the 1866 tract.)

"The said tract of land bounded and described *in the sentence immediately foregoing this* being the southern half of the tract *known as* Location No. 3 of the Baca Series."

The deed of November 19, 1892 (P. R. 400) from Mr. Robinson to the Bouldins was in the same form as the deed of November 12, 1892 which they gave Mr. Robinson, with the exception that it conveyed specifically the north half of the 1866 tract instead of the south half.

The partition by its terms superseded all previous agreements and was clearly of right, title and interest in the 1866 tract in the Santa Rita Mts., which the parties called and which was then in fact known as Location No. 3 of the Baca Series. The 1866 tract is the tract of which David W. Bouldin, the attorney-in-fact for his sons, took actual possession in 1887 and had surveyed and monumented (P. R. 235).

Being a partition of right, title and interest in the 1866 tract, the Bouldins acquired nothing thereunder; and the utmost that Mr. Robinson acquired was the overlap between the 1863 and 1866 tracts, as that is in the south half of the 1866 tract.

CONSTRUCTION OF HAWLEY DEED

This deed is a quitclaim, without any word of sale, for a certain, definite tract of land, the 1866 tract, by its correct metes and bounds.

The Hawley deed conveyed and was intended to convey only the 1866 tract, and none of the parties claiming under it made any claim to the 1863 tract until Watts and Davis came into the situation in 1906 or 1907.

Effect of Pleadings

In the Bill (P. R. 7), it is claimed that John S. Watts "intended to and did convey" to Christopher E. Hawley by the deed of January 8, 1870, the 1863 location of Baca Float No. 3, and that the description by metes and bounds of the 1866 tract

"was used under the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float."

In our verified answer we specifically and positively deny these allegations. No evidence was offered by the plaintiffs to support their averments. As our responsive answer was not overcome by two witnesses or by one witness and strong corroborative circumstances, it must be taken as true: we have "conclusively proved" our denials.

Vival v. Hopp, 104 U. S., 441;

Campbell v. Eckington, 229 U. S. 561, 573, 579,
580, 584;

Southern Dev. Co. v. Silva, 125 U. S. 247, 249;

Beuls v. Ill. R. R. Co., 133 U. S. 290, 295.

On the record at bar, this Court must affirmatively assume that in 1870 there was no "mistaken belief" as to the metes and bounds, and that John S. Watts had no intention to convey the 1863 tract.

Only Interpretation required

As the plaintiffs have expressly disavowed any desire to reform the Hawley deed, they must, under the pleadings, demonstrate that the Hawley deed on its face conveys the 1863 tract.

To interpret that deed we shall analyze its various parts and prove the obvious proposition that a conveyance of one tract does not pass the title of another tract.

Conveyance of Specific Tract

The parties were dealing with a specific tract of land and not with general statutory rights; and a specific tract of land is clearly and accurately described.

In the Prentice cases (154 U. S. 163; 113 U. S. 435), we find:

1. Only one selection and that very vague.
2. A specific description largely under water.

3. Unskillful preparation of the deed on a legal blank.

With reference the Hawley deed we find:

1. A carefully prepared instrument.
2. A correct description of a definite tract of land in which the grantor then had an interest.
3. A deliberate choice of one of two selections.
4. The recited instruments indicating a description for the 1863 tract, if there had been any intention to insert it in the conveyance.
5. The maxim "*expressio unius est exclusio alterius*" peculiarly applicable.
6. A uniform use of the specific description for nearly thirty years thereafter, with numerous applications for a survey thereof, declarations that the 1866 tract alone was desired (P. R. 396) and even the selection of specific parts thereof in partitions.

Consequently, *Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 175, 176, is absolutely decisive that only the 1866 tract passed under the Hawley deed:

"It is not necessary that we resort to the supposition that (the grantor) was talking about some vague and uncertain right—uncertain, at least, as to locality, and as to its relation to the surveys of the United States—which he was intending to convey to (the grantee), instead of the definite land

which he described, or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea * * *. We are *not* able, therefore, to hold, with counsel for the plaintiff, that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative that the deed was intended to convey any land that might ultimately come to (the grantor) under the treaty, and under the selection, and under the assignment" to the grantor of the treaty rights.

Calls of Description

The Hawley deed contains the following calls of description:

1. That (one) certain tract of land,
2. Situate in the Santa Rita Mts.,
3. Described by the metes and bounds of the 1866 tract,
4. "Said tract of land being *known as* Location No. 3 of the Baca Series," referring to the specific description and giving its name at that time (*Prentice v. N. P. R. R. Co.*, 154 U. S. 163, 174).

Title References

There are also in the deed two statements of the source of title:

1. A grant by the United States to the heirs of Baca.
2. A conveyance by the Baca heirs to John S. Watts on May 1, 1864.

These title references are not words of independent description; they only give the grantor's supposed chain of title and refer to the specific description.

Prentice v. N. P. R. R. Co., 154 U. S. 163, 176;

Lovejoy v. Lovett, 124 Mass. 270, 274;

Tyler v. Hammond, 28 Mass. (11 Pick.) 193;

Clark v. Roller, 51 S. E. 816; 104 Va. 72;

Schaffer v. Heidenheimer, 96 S. W. 61; Tex.

C A.;

Cullers v. Platt, 16 S. W. 1003; 81 Tex. 258.

Applicability of Calls of Description

The 1866 tract is the only tract which will answer *all* the calls of description in the Hawley deed:

1. It is situate in the Santa Rita Mts.; in fact it is located entirely within those mountains, and no part of the 1863 tract except the overlap lies within the mountains or the foothills.
2. The specific description of the 1866 tract was copied *verbatim*, with the same order of courses as in the application therefor.
3. The Bill avers (Section 7) that the 1866 tract was then in fact "known as Location No. 3 of the

Baca Series," and the testimony herein confirms that contention.

The 1863 tract will satisfy *none* of the calls of description in the Hawley deed:

1. It is not located within the Santa Rita Mts.
2. It does not have the metes and bounds of the 1866 tract.
3. According to Section 7 of the Bill and the evidence, it was not then "*known as* Location No. 3 of the Baca Series."

Applicability of Title References

The 1866 tract will answer both of the title references in the Hawley deed:

1. It was in fact granted to the Baca heirs by the United States on May 21, 1866, through the Commissioner of the General Land Office, whose power was plenary unless and until overruled by the Secretary of the Interior. The application of April 30, 1866 (P. R. 176) was in the name of the Baca heirs.
2. The rights of the Baca heirs therein passed under their deed to John S. Watts of May 1, 1864, conveying the 1863 tract, the valid and approved location, because the conveyance of their rights in the approved location passed with it the right to use their name in any future dealings thereover with

the United States, just as the conveyance of a chose in action gives by implication alone the right to the assignee to use the name of the assignor. Whatever rights John S. Watts had in the 1866 tract certainly came through the deed in question, and the title reference is absolutely accurate.

Analysis of calls and references

The Court will observe:

1. The 1866 tract fits all the calls of description in the Hawley deed and the 1863 tract fits none of them.
2. The 1866 tract answers the title references in the Hawley deed to the same extent as the 1863 tract.

The Hawley deed, therefore, conveyed only the 1866 tract, irrespective of any "conjectural intent" to the contrary.

Washburn on Real Property, 6th Ed. Sec. 2319;

Tiedeman on Real Property, 2nd Ed. Sec. 829;

4 Am. & Eng. Ency. Law (2nd Ed.) 799.

Changes necessary.

The Hawley deed cannot apply to the 1863 tract unless three changes are made in that deed:

1. The statement of location in the Santa Rita mountains stricken out.
2. The specific description reformed by substituting the monument and beginning point of another tract.
3. The tract name statement changed to read that the tract was known in the deed to Judge Watts as Location No. 3.

Disregarding metes and bounds

Our opponents ask the Court to "construe" the Hawley deed by eliminating the specific description. This would leave a description as follows:

"All that certain tract, piece or parcel of land, lying and being in the Santa Rita mountains, in the Territory of Arizona, U. S. A., containing 100,000 acres more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864. The said tract of land being known as location number 3 of the Baca series."

According to section 7 of the Bill, and the evidence, the 1866 tract alone was *known as* Baca Location No. 3 in 1870. That tract lies entirely within the Santa Rita mountains and the 1863 tract only abuts thereon. Both tracts answer the references to the grant and the title deed, as heretofore explained. It is, therefore,

apparent that even after omitting the description by metes and bounds the Hawley deed covers only the 1866 tract.

Internal Evidences of Intention

There is very striking internal evidence in the Hawley deed that it was intended to pass nothing but the 1866 tract:

1. It was a quitclaim deed, *without any word of sale*, and in sharp contrast to the full covenant warranty deeds from the Baca heirs to Judge Watts. Its quitclaim form implied a mutual recognition that a complete legal title to the tract specifically described was not then in the grantor, as the grant of the 1866 tract was subject to an unfulfilled condition precedent.
2. Mention was made of the Santa Rita Mts. as the locality to indicate unmistakably that the particular land of the 1866 tract was sought and to make a definite description for that tract, which, as selected (P. R. 176), began with reference to an *unlocated building*.
3. The careful separation of the recitals of grant and title conveyance from the statement of the name of the tract indicates a studied desire to avoid giving the impression that the 1866 tract was in fact location No. 3 of the Baca series or was known as such in the deed to Judge Watts.
4. The exact order of courses and exact description

of the 1866 tract were used; and carefully worded and separated references were made to the grant from the United States, the deed to the grantor, the present name of the tract, and the location of it in the Santa Rita Mountains.

5. The form, appearance and double acknowledgment indicate careful preparation; there is every reason, therefore, for holding that it was intended to mean just what it appears to mean.
6. There was an unusually competent and experienced grantor. John S. Watts was then a prominent lawyer and had been a delegate to Congress from New Mexico (of which until 1863, Arizona formed a part), a former Justice and later Chief Justice of the Supreme Court of New Mexico. He had had a wide experience in real estate matters and in the preparation of real estate papers (P. R. 303). We must assume, therefore, that Judge Watts knew how to express his intent and that the expression of it in the Hawley deed is correct.

Delay in recording

After Hawley visited the 1866 tract in 1875 and the Surveyor General refused to survey it, nothing whatever was done by Hawley until 1884, when he conveyed to Mr. Robinson in a very guarded instrument (P. R. 208).

The Hawley deed was not recorded until over fifteen years after its execution and not until Mr. Robinson had obtained permission (subsequently overruled) to

select other land in lieu of the 1866 tract, which he had admitted in his petition to the Commissioner was mineral land to which title could not pass from the United States (P. R. 181).

The form of the deed to Mr. Robinson, the recitals in the latter's petition to the Commissioner, and the conduct of Hawley and Robinson in not promptly recording their deeds, show that only the 1866 tract with its conditional title was the known subject of the Hawley deed. When a man believes he has acquired a good title to a tract of 100,000 acres of land, he promptly records his deed.

Construction by possession

The witness Magee took charge and possession of the 1866 tract for a mining company which claimed to own it. From his concurrent relationship to Hawley, there was some association between Hawley and the company. Mr. Magee remained on the tract for fifteen years. He testified he had nothing to do with the 1863 tract.

In 1887, Mr. Bouldin, then closely allied with Mr. Robinson, again took possession of the 1866 tract and had it surveyed and monumented.

The possession taken under the Hawley deed is strong evidence of what it was supposed and intended to convey.

Reasons for Choice of 1866 Tract

There are three reasons why Hawley in the exercise of good business judgment desired only the 1866 tract:

1. It is located in a mountainous mineral region and could be readily marketed; while the 1863 location was mostly desert land and unsaleable.
2. The mineral products of the 1866 tract would justify the expense of taking them to market. The lack of railroad transportation and the hostility of the Apache Indians made the 1863 tract commercially valueless.
3. A claim for the conflicting Tumacacori and Calabasas grant had been filed with the Surveyor General of Arizona on June 9, 1864 (*Astiazaran v. Mining Co.*, 148 U. S. 80, 81), covering the entire amount of agricultural land in the 1863 tract, as well as the chief water supply and a large amount of the grazing land; and the Mexican claimant was in actual possession (P. R. 245). There was also the conflicting Sonoita grant which controlled the only other water supply. In the arid regions of the Southwest, land without a water supply was then valueless.

Construction of Description

Considered as a whole the Hawley deed passed and was plainly intended to pass only the 1866 tract.

There was no conveyance of location No. 3 as such, or wherever or finally located, but only of a specific tract then actually and expressly stated to be "known as" Location No. 3 and being one of two tracts of that name.

There was every opportunity to insert the description of the 1863 tract if that also was to be conveyed. The recited papers constructively put the grantee on notice

and inquiry, and there is every reason to suppose from the size of the transaction that there was in fact a careful examination of title before the conveyance.

As the specific description described a tract in which the grantor had or was supposed to have an interest, the Court cannot disregard it. Certainly we cannot assume that the grantor intended to convey another tract in the same locality, even if we assume that he believed he owned the 1866 tract and not the 1863 tract (*Russell v. Trustees*, 1 Wheat. 432, 436, 437).

If there be a conflict between the metes and bounds and the rest of the description, then the metes and bounds control, beginning as they do from a well established beginning point, and the utmost that passed of the 1863 tract was the overlap between the two tracts.

Considered as an assignment of the grantor's conditioned rights in the 1866 tract as a location, the deed became inoperative on the Secretary's decision of July 25, 1899 against the validity of that location (29 L. D. 44).

Construction by the parties

1. Hawley's power of attorney, executed about the time of the deed to him, authorized the sale only of his right, title and interest in the land conveyed to him. This shows his recognition that he had only an uncertain title to the land quitclaimed to him by John S. Watts (P. R. 207).
2. In the deed of May 5, 1884 from Hawley to Robinson, the conveyance is of right, title and interest,

“whatever the same may be,” showing that the grantor was afraid to use merely the ordinary words of quitclaim for fear of implying that he actually had something to convey.

3. Hawley and his grantees consistently until 1899 used the metes and bounds description of the 1866 tract, merely stating that it was “known as” Baca Location No. 3, and repeatedly asked for a survey thereof.
4. In the Robinson-Bouldin partition of November 1892, the 1866 tract is specifically described and specific portions thereof are selected by each party, showing not only that it was the particular tract of land in the minds of the parties, but that they knew sufficient about it to select specific parts thereof in the partition.
5. In the quitclaim deed from Ireland and King to Mr. Mathews of February 7, 1894 (P. R. 219), the grantors released their interest in the southerly half of the 1866 tract by metes and bounds. Under the instrument then recorded, executed in favor of Ireland and King by Bouldin (P. R. 272), they had a contingent interest in the 1863 tract. If Mr. Mathews then claimed any title to the 1863 tract, why did he take a quitclaim deed from Ireland and King only for the southerly half of the 1866 tract?
6. If Mr. Mathews claimed any interest in the 1863 tract, would he not have inserted in the confirmatory Bouldin deed of February 7, 1894 (P. R. 229) a quitclaim of whatever rights the Bouldins

had therein under the paper executed in behalf of the Watts heirs to David W. Bouldin on September 30, 1884 (P. R. 272), especially as Mr. Mathews in 1893 secured quite a number of quitclaim deeds?

7. In 1901, Alex. F. Mathews, for whose estate the plaintiffs are admittedly, in part at least, trustees, applied to the Department of the Interior, in a petition signed by him and by the son of Samuel A. M. Syme as his attorney, for a review of the decision of 1899 which set aside the amended location, and stated that:

*The amended location from 1866 to 1899 "was understood to be Baca Float No. 3 * * * the land as described in the amended description * * * passed from grantee to grantee for large considerations as Baca Float No. 3, and there was no thought or question that any other portion of the earth was Baca Float No. 3 in law or in fact;" and there was no reason to justify the Government "in taking from the grant claimants the land it had permitted them to buy without question and place them on land which is claimed by others in large part, a portion being by those to whom the Government has itself given patents" (P. R. 396).*

This petition was filed two years after the rejection by the United States Supreme Court of the Tumacacori and Calabasas claim (*Faxon v. U. S.*, 171 U. S. 244), and of the greater part of the Sonoita claim (*Ely v. U. S.*, 171 U. S. 220). The

admission by Mr. Mathews against his interest during his ownership, is admissible in evidence herein against the plaintiffs, who claim under him (*Baker v. Humphrey*, 101 U. S. 494, 499; *Gaines v. Reif*, 12 How. 472, 531; *Rush v. French*, 1 Ariz. 99, 143; 25 Pac. 816; *Costello v. Graham*, 9 Ariz. 257, 263; 80 Pac. 336; *Wigmore on Evidence*, Sec. 1080; 16 *Cyc.* 986b).

8. Not only did Hawley and his grantees claim nothing but the 1866 tract until after 1899, but Judge Watts and his family continued to claim the original tract as pointed out in the statement of the case.
9. Plaintiffs' predecessors in interest, all able and prominent men, for over thirty years repeatedly asked either for a survey to demonstrate that the notoriously mineral 1866 tract was in fact non-mineral, or for the privilege of selecting some other land in lieu of it, on their admission that it was in fact mineral land. Would they have done so, if they in fact believed they had any title to the valid 1863 tract?

Remedy for Wrong Description

Where by mistake the wrong description is inserted in a deed, the grantee's only remedy is an action for reformation; in such an action he can succeed only on proof of a mutual mistake of fact. Furthermore, he must ask for reformation as soon as he discovers the mistake; and he must proceed diligently and adhere to the claim

of mistake (*Shapiro v. Goldberg*, 192 U. S. 232, 242; *Pence v. Langdon*, 99 U. S. 578, 582).

Hawley never complained about his deed. He was on the property in 1875, and unquestionably was familiar with the legal status of both tracts as well as with their geography.

Mistaken Purchase

If Hawley purchased the 1866 tract in the hope or under the supposition that it eventually would be "location No. 3 of the Baca series," he took only the 1866 tract under the deed; and no court can reform both his deed and his bargain. Mistakes in judgment are not compensated by giving a grantee what he should have bought or transferring his deed to other land of the grantor.

Conclusion

The United States Supreme Court, in an early case (*Russell v. Trustees*, 1 Wheat. 432) *refused even to reform a deed for a grantee whose difficulties were similar to those of Messrs. Watts, Davis and the Bouldins*, and said:

"Where A conveys to B by metes and bounds, the circumstances ought to be very strong to prove that he meant to convey any other lands than those specifically described, before this Court would be in-

duced to set aside one deed, and decree the execution of another. * * *

“If a person supposing himself possessed of a specific tract of land in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less that he would have sold it for the same price.
* * *

“When an individual supposing his warrant located on Black Acre, when it is in fact, located on White Acre, conveys the former by metes and bounds, it must be a strong case that will sanction a Court in setting aside the conveyance of the one, and decreeing that of the other. * * *

“In this case the Court explicitly avows that it has been not a little disposed to look unfavorably on a claim of such great antiquity. Nearly forty years have elapsed since McKee conveyed this land to Ross. Almost every party and almost every witness must be no more; and to undertake at this late date to inquire into the intention of the parties in a transaction so very remote in time, might be attended with difficulties and evils which cannot now be foreseen.”

A fortiori, the metes and bounds will prevail, where no reformation is sought and the Court is asked, after a delay of over forty-five years, simply to quiet a title by remodeling a uniform system of conveyancing which for thirty years was uniformly used and deemed correct.

INSTRUMENT OF SEPTEMBER 30, 1884

The facts with reference to that document are set out herein in our Statement of the Case, pages 10 to 12.

The trial court excluded the document from evidence but it appears in full in the record (P. R. 272). Under the decree, it is removed as a cloud on title.

Status of Parties

Only the defendant Joseph E. Wise is in a position to assert that the instrument is an absolute conveyance, and he must first prove the validity of his title through the Sheriff's sale of the interest of David W. Bouldin or of his administrator.

The defendants Bouldin filed a carefully limited notice of appeal and did not appeal from the fourth and fifth sections of the decree which bar them from asserting title under the instrument of September 30, 1884, and remove it as a cloud on title. Even in their answer, the Bouldins asked only for the north half of the 1863 tract under the Robinson-Bouldin partitions; and their assignments of error follow their notice of appeal and show that they can rely only on their title through Hawley.

Unless, therefore, this Court finds that Joseph E. Wise has whatever title (if any) passed to David W. Bouldin under the disputed instrument, it must stand removed as a cloud on title, and the defendants Bouldin and Joseph E. Wise barred from asserting any title thereunder. In that event, the question as to whether the in-

strument is an executory contract or an absolute conveyance will be only academic.

Record Complete

The defendant Joseph E. Wise presented his full case (including the deposition of John Watts and the record of the disputed instrument) before we put in our case and before the trial court ruled on the Hawley deed.

The solicitor for the Bouldin defendants expressed his absolute concurrence with the ruling on the Hawley deed and suggested that the plaintiffs' objections to the disputed instrument be sustained (P. R. 419). The exception taken by the Bouldins to its rejection from evidence, "out of an abundance of caution" (P. R. 419), is therefore a nullity, especially in view of their limited notice of appeal and assignments of error, and the prayer of their answer. The Bouldins proved their title instruments then rested their case.

No evidence of performance was offered either by the Bouldins or the defendant Wise. There was in fact no performance of the contract but a complete abandonment of it less than a year after it was executed.

We excepted to the rejection of the instrument only because of the reasons for the rejection, and because our objections to the instrument were not sustained. We do not assign as error the removal of the instrument as a cloud.

Form of Instrument

From the cases hereafter cited, the Court will note that in the Southwest and in Pennsylvania, an instrument with the phraseology of a conveyance has often been used with the intent that it shall operate upon or if certain covenants are performed. Such instruments, in the form of future or conditional conveyances, are apparently in common use in those localities; and the Courts have uniformly construed them to be executory contracts on their face.

Every consideration of the disputed instrument at bar and of its surrounding circumstances proves that no conveyance *in praesenti* was intended or even understood to have taken place.

Void as a Conveyance

As to location No. 3, the instrument recited that the location had been disapproved, and it was made incumbent upon Mr. Bouldin to secure its approval or to get something from the United States in lieu thereof. The instrument, therefore, required Mr. Bouldin to prosecute a claim against the United States before one of its departments or in one of its courts.

Under section 3477 of the United States Revised Statutes, the instrument (if a conveyance) and the power of attorney therein contained are "absolutely null and void," even between the parties, especially as it was not acknowledged as required by the section and there was

no certificate of acknowledgment in the form provided thereby.

National Bank of Commerce v. Downey, 218 U. S. 345;

Ball v. Halsell, 161 U. S. 72;

Nutt v. Knut, 200 U. S. 12.

The section expresses a public policy and has been given a very wide application. Claims against the United States are either for money or for property; and the section expresses a salutary public policy as to all such claims.

No Authority in John Watts to execute Conveyance.

The instrument was executed by John Watts individually and as attorney in fact for his mother, Elizabeth A. Watts, his brother, J. Howe Watts, and his three sisters. There is no recital of any power of attorney in the instrument itself.

In 1884, the Arizona statute (*Ariz. Comp. L.* 1864-1871, Ch. 42, Sec. 27) required that every power of attorney to execute conveyances must be in writing, signed and acknowledged by the donor of the power.

The testimony of John Watts taken on deposition in behalf of the defendant, Joseph E. Wise, conclusively shows that he had no authority to make any conveyance to Mr. Bouldin (P. R. 301); that he never told his mother, brother or sisters that he had made an absolute conveyance (P. R. 304); and he could not recall

whether or not the powers of attorney were acknowledged (P. R. 287, 302).

No power can be presumed from the fact that the Bouldin paper is an ancient document, as there has been no possession or act of ownership thereunder and the body of the instrument contains no recital of authority.

The parties claiming under Mr. Bouldin did not attempt to rely on any presumption but took testimony in an attempt to prove authority; that testimony affirmatively shows a lack of authority to execute a conveyance and rebutted any possible presumption to the contrary. When a party negatives a possible presumption in his favor, he is bound by the testimony and cannot rely upon the presumption. A presumption supplies a lack of evidence; it does not disprove a party's own evidence.

Consequently the instrument (if a conveyance) passed only two-thirds of the one-tenth interest of John Watts, and not the community half of his mother or the four-tenths of his brother and three sisters. The statement that the grantors were not to be responsible for a failure of title covers the manner of execution.

Erroneous Rulings on Evidence

Our tenth assignment of error relates to the exclusion of the testimony of John Watts that neither he nor the other heirs received any money from Mr. Bouldin for signing the instrument (P. R. 298). This testimony was competent as it did not tend to vary the instrument, which recited a nominal dollar as the money considera-

tion, the formality used where no actual money consideration passes (*Bales v. Bales Chapel*, 101 S. W. 150; 124 Mo. App. 122). The rejected testimony also showed what the actual consideration was, namely, the performance of covenants by Mr. Bouldin (P. R. 307).

Our eleventh assignment of error relates to the exclusion of the testimony of John Watts that neither he nor Mr. Bouldin ever regarded or referred to the instrument in any way except as a contract or agreement (P. R. 305, 308). Proof of contemporaneous construction is always admissible in the construction of an ambiguous instrument. The instrument is certainly ambiguous, as it combines parts of a conveyance, contract and power of attorney.

Our twelfth assignment of error relates to the exclusion of the letter written to John Watts by Mr. Bouldin on November 25, 1884, referring to the instrument as an agreement, and identified by Mr. Watts as to subject matter (P. R. 415, 301). This was admissible as a declaration against interest, binding on Mr. Bouldin's successors (see cases cited on page 75 herein) and also to show the contemporaneous construction.

In practically all of the cases cited on pages 84 and 85, testimony similar to that excluded herein was received and considered.

All of the excluded evidence was received by the trial Court under the Forty-sixth Equity Rule and is in the record. This Court may, therefore, consider it and do full justice, without ordering a new trial.

Rule of Construction

Irrespective of any words of present conveyance in the instrument, it is to be construed as an executory contract, if on consideration of the paper as a whole it is apparent that an executory contract was intended.

Williams v. Paine, 169 U. S. 55, 76;

Chavez v. Bergere, 231 U. S. 482, 487, aff'g 93 Pac. 762, 14 N. M. 352;

Taylor v. Burns, 203 U. S. 120, aff'g 8 Ariz. 463, 76 Pac. 623;

O'Brien v. Miller, 168 U. S. 287, 297;

Interurban Land Co. v. Crawford, 183 Fed. 630; 17 A. & E. Ency. Law (2nd Ed.) p. 5;

Foster v. Foster, 83 Eng. F. R. 294; 1 Levinz 55; K. B. Div. Charles II;

Chapman v. Glassel, 48 Am. Dec. 41 and note; 13 Ala. 50;

Jackson v. Meyers, 3 Johns. 387; Kent Ch. J.;

Jackson v. Moncrief, 5 Wend. 26;

Atwood v. Cobb, 16 Pick. (Mass.) 227; 26 Am. Dec. 657; Shaw, C. J.;

Dreisbach v. Serfass, 126 Pa. 32; 17 Atl. 513; 3 L. R. A. 836;

Phillips v. Swank, 120 Pa. 76; 13 Atl. 712; 6 Am. St. Rep. 691;

Maus v. Montgomery, 11 S. & R. (Pa.) 329;

Williams v. Bentley, 27 Pa. 294;

Stewarts Admrs. v. Long, 37 Pa. 201; 78 Am. Dec. 414;

- Ogden v. Brown*, 33 Pa. 247;
Kenwick v. Smick, 7 W. & S. (Pa.) 41;
Mineral Dev. Co. v. James, 97 Va. 403, 413; 34
 S. E. 37;
Sayward v. Gardner, 31 Pac. 761; 5 Wash. 247;
Ellis v. Jeans, 7 Calif. 409;
Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415;
Powell v. Hunter, 102 S. W. 1020; 204 Mo. 393;
 re-aff'd in 165 S. W. 1009;
Warne v. Sorge, 167 S. W. 967; Mo.;
Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;
Cooper v. Mayfield, 57 S. W. 48; aff'd 58 S. W.
 827; 94 Tex. 107;
Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;
Wallace v. Wilcox, 27 Tex. 60;
Peterson v. McCauley, 25 S. W. 826; Texas;
Kelly v. Dooling, 23 Ark. 582.

This is the invariable rule where the instrument expressly contemplates a future conveyance. It is also the rule even where a future conveyance is not expressly contracted for; in many of the above cases, there was no mention made of a future conveyance.

Most of the cases were ejectment, partition, or other title actions. They demonstrate that when an instrument with the phraseology of a conveyance is declared to be an executory contract, the decision is given as a matter of judicial construction, and not because of any reformation.

Particular Cases

The cases cited are unvarying in their expression of the rule. Space will not permit discussing any of them; but we particularly call the attention of the Court to the following cases, because of similarities with the instrument at bar.

- Chavez v. Bergere*, 231 U. S. 482, aff'g 14 N. M. 352, 93 Pac. 762;
Taylor v. Burns, 203 U. S. 120, aff'g 8 Ariz. 463, 76 Pac. 623;
Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;
Cooper v. Mayfield, 57 S. W. 48; aff'd in 58 S. W. 827; 94 Tex. 107;
Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;
Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415;
Mineral Dev. Co. v. James, 34 S. E. 37; 97 Va. 403;
Dreisbach v. Serfass, 17 Atl. 513; 126 Pa. 32; 3 L. R. A. 836;
Williams v. Bentley, 27 Pa. 294;
Stewarts Admrs. v. Lang, 37 Pa. 201; 78 Am. Dec. 414;
Ogden v. Brown, 33 Pa. 247, cited with approval in 169 U. S. 55, 76;
Wallace v. Wilcox, 27 Tex. 60.

Analysis of Cases

From the foregoing cases it will be seen that even though an instrument contains all the apt words of a

formal conveyance *in praesenti*, still if from an inspection of it as a whole it appears that:

- (a) It was made in consideration of the performance of certain covenants by the purchaser; or
- (b) A further conveyance was expressly or impliedly contemplated; or
- (c) The subject matter of the instrument depended upon the successful efforts of the purchaser; or
- (d) From the addition of a power of attorney, it is manifest that the words of conveyance were used to effectuate the power; or
- (e) If the instrument was executed as an executory contract,

then in any of such contingencies the instrument is to be considered an executory contract.

In the case at bar, we have every enumerated factor which has been adjudicated as sufficient in itself to overcome words of present conveyance.

Analysis of Instrument

A consideration of the various elements in the paper at bar which are not found in a conveyance will demonstrate beyond a doubt that only a contingent retainer contract was intended, or just what John Watts, a disinterested witness, *when called as a witness in behalf of Mr. Wise*, declared was the purpose and mutual understanding of the paper and the object of the negotiations.

Signature by Both Parties

The fact that an instrument was signed by both parties has often been held an important factor in construing it as an executory contract, instead of a conveyance.

Chavez v. Bergere, 231 U. S., 482, 487; aff'g.
De Bergere v. Chavez, 93 Pac. 762, 764; 14
 N. M. 352;

Browton v. Watson, 67 Ala., 121, 125;

Atwood v. Cobb, 16 Pick. (Mass.) 227, 229, 230,
 26 Am. Dec. 657;

Mineral Dev. Co. v. James, 34 S. E. 37; 97 Va.
 403;

Dreisbach v. Serfass, 17 Atl. 513; 3 LRA 836;
 126 Pa. 32;

See *Powell v. Hunter*, 102 S. W., 1020; 204 Mo.
 393; re-aff'd in 165 S. W. 1009.

The instrument at bar was signed by or in behalf of both parties thereto, thus showing clearly that John Watts wished to have no doubt that Mr. Bouldin was bound to perform his agreement. The parties clearly treated the paper as a bilateral contract.

Absence of acknowledgment

In many cases, the absence of an acknowledgment has been considered a determinative factor in construing an ambiguous instrument to be an executory contract, instead of a conveyance.

- Chavez v. Berger*, 231 U. S. 482; aff'g;
De Berger v. Chavez, 14 N. M. 352; 93 Pac.
 762;
Lipscomb v. Fuqua, 121 S. W. 193, 194; 55 Tex.
 C. A. 535 aff'd in 131 S. W. 1061;
Stewart's Admrs. v. Lang, 37 Pa. 201, 205; 78
 Am. Dec. 414;
Mineral Dev. Co. v. James, 34 S. E. 37, 97 Va.
 403;
Dreisbach v. Serfass, 17 Atl. 513; 3 LRA 836,
 126 Pa. 32.

In spite of the fact that Mr. Bouldin in 1878 had secured deeds or executory contracts from alleged Baca heirs, and had been very careful to have such papers duly acknowledged, the instrument of September 30, 1884, was not acknowledged by either party, although executed in El Paso or Santa Fe where it could readily have been acknowledged. Every other Bouldin paper in this record was carefully acknowledged.

Mr. Bouldin came to Mr. Watts recommended as a good business man. Everybody knows that a deed or mortgage of real property must be acknowledged in order to be recorded and must be recorded for the protection of the grantee. It is also a matter of common knowledge that executory contracts for the conveyance of real property need not be acknowledged.

Under the circumstances, the failure to have the paper acknowledged shows that the parties understood it to be an instrument which did not require acknowledgment.

Situation of parties

It is elementary that the situation of the parties at the time of the execution of the paper may be shown to aid in the construction of an ambiguous instrument, such as that under discussion.

Warne v. Sorge, 167 S. W. 967, 968; Mo.;
Kearick v. Smick, 7 W. & S. (Pa.) 41, 45;
Phillips v. Swank, 120 Pa. 76, 13 Atl. 712; 6
 Am. St. Rep. 691.

The best way to ascertain the intent of the parties in the circumstances under which the instrument was executed is to put ourselves in their situation at the time. They contemplated that something might be made out of a chaotic situation; but the extent and ultimate form of the success of Mr. Bouldin's efforts were entirely speculative. The recitals which are binding herein (*Devlin on Deeds*, 3rd Ed., Secs. 992, 997), show what the situation was understood to be. Mr. Bouldin came to John Watts seeking employment on a contingent retainer contract. As he was a stranger to Mr. Watts, he certainly would not be royally rewarded in advance for a mere promise to do certain things.

Is it possible to suppose that the Watts heirs, for one dollar and a mere promise, would convey absolutely to a stranger a two-thirds interest in three tracts containing in the aggregate 300,000 acres of land? The size of the transaction is in itself conclusive evidence that the words of conveyance were to operate only on the performance of the obligations assumed by Mr. Bouldin,

especially as their *performance* was expressly stated as the consideration and inducement for the paper.

Shall we assume the parties contemplated or expected that in case Mr. Bouldin died immediately after the delivery of the paper, his heirs would be vested with a two-thirds interest in three Baca Floats, and the Watts estate as to its one-third interest left in the same chaotic state in which it was, or was supposed to be, immediately before the delivery of the paper?

Uncertainty of Subject Matter

The uncertainty of the subject matter over which an instrument is to operate has been held sufficient to denominate it an executory contract and not a conveyance.

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;

Haslett v. Harwood, 16 S. W. 310; 80 Tex. 510.

By reference to the paper it will be seen that as regards Baca Float No. 3, the parties were uncertain as to which of the following things would be embraced in the contemplated division of the result of Mr. Bouldin's labor and expenditures:

1. Baca Float No. 3,
2. The Las Vegas grant,
3. Cash by reason of any sale by Judge Watts,
4. Property by reason of any transaction had by Judge Watts,
5. Indemnity lands from the United States,
6. Land certificates from the United States.

As Baca Float No. 3 was not believed to have any present valid existence, with only a contingent possibility that its validity could be established by Mr. Bouldin or something received therefor, the parties certainly did not intend to make any present conveyance of a subject matter which had only a future potential existence. The very purpose of the paper was to bind Mr. Bouldin to bring something into actual existence for the Watts heirs. Certainly there was no reason why they should give him his full compensation before he succeeded in his efforts, especially as the medium of payment had not then been ascertained.

Executory Consideration

The non-payment of consideration, or the fact that the consideration was executory, has repeatedly been held to be a persuasive factor in determining that no absolute conveyance was made.

Taylor v. Burns, 203 U. S. 120, 125; affirming
8 Ariz. 463, 76 Pac. 623;

Wallace v. Wilcox, 27 Tex. 60, 67;

Cooper v. Mayfield, 57 S. W. 50; aff'd in 58 S.
W. 827, 94 Tex. 107;

Hazlett v. Harwood, 16 S. W. 310, 311; 80 Tex.
827;

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665;

Ellis v. Jeans, 7 Cal. 409, 414;

Dreisbach v. Serfass, 126 Pa. 32, 40; 17 Atl.
513; 3 LRA 836;

Stewart's Admrs. v. Lang, 37 Pa. 201, 204; 78
Am. Dec. 414;

Ogden v. Brown, 33 Pa. 247, 249, 250;

Kelly v. Dooling, 23 Ark. 582.

A receipted consideration of One Dollar was expressed in the following cases of executory contracts with words of present conveyance:

Taylor v. Burns, 203 U. S. 120 aff'g 8 Ariz. 463; 76 Pac., 623;

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510;

Dreisbach v. Serfass, 17 Atl. 513; 126 Pa. 32; 3 LRA, 836;

Dunnaway v. Day, 63 S. W. 731; 163 Mo. 415.

Even where the entire consideration had been paid, instruments with words of conveyance have been held to be executory contracts.

Chavez v. Bergere, 231 U. S. 482; aff'g 14 N. M. 352, 93 Pac. 762;

Sayward v. Gardner, 31 Pac. 761; 5 Wash. 247;

Paterson v. McCauley, 25 S. W. 826; Tex. C. A.;

Chapman v. Glassell, 13 Ala. 50; 48 Am. Dec. 41.

In many other cases heretofore cited, there had been a part payment of consideration.

In the paper at bar, there was no recognition of past services or past expenditures, nor were there any past

services or past expenditures by Mr. Bouldin for the Watts heirs. Everything that Mr. Bouldin was to do or to spend was *in futuro*. The form and even the existence of the subject matter of the instrument depended upon the successful result of his efforts or negotiations. Every expressed consideration for the paper, except the formality of a dollar (*Bales v. Bales Chapel*, 101 S. W. 150; 124 Mo. App. 122), was expressly stated to be the *performance* of Bouldin's agreement as to what he should do thereafter. The statement as to a mutual compromise expressed a prospective purpose and not a consummated intent, as there was no conveyance by Mr. Bouldin and the compromise was not to take effect until "the final and complete settlement of the title and all matters connected therewith."

As the entire consideration was executory, and as even the existence of a subject matter for the paper was not only uncertain, but expressly contingent upon the successful result of Mr. Bouldin's efforts, and inasmuch as the paper was executed as executory contracts are executed, with the signature of both parties and the acknowledgment of neither, the logical conclusion is that the words of conveyance in the paper are executory and as much *in futuro* as the consideration for the paper and the subject matter over which it might operate.

Performance as a Condition

When an agreement is made in consideration of the performance of the promises of one of the parties, such performance is a condition precedent to any performance

by the other party.

Telfener v. Russ, 162 U. S. 170, 179, 180;

9 *Cyc.* 643 to 646;

Stewart's Admrs. v. Lang, 37 Pa. 201, 204; 78
Am. Dec. 414;

Dreisbach v. Serfass, 126 Pa. 32; 17 Atl. 513;
3 LRA 836;

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665.

The only consideration for the paper was the performance by Mr. Bouldin of his covenants to clear up the title and secure something for the Watts heirs. The deposition of John Watts proves this and the paper itself corroborates him.

As performance by Mr. Bouldin was a condition precedent, the words of conveyance were conditional, and were not to operate unless or until Mr. Bouldin performed his covenants.

Consequently the paper must be deemed executory, and to quote Chief Justice Shaw, the words of conveyance "must be construed to mean 'have agreed and contracted to convey.'" (*Atwood v. Cobb*, 16 Pick. Mass. 227, 229, 230; 26 Am. Dec. 657.)

Power to take possession

A provision allowing possession has been deemed of great importance in construing an ambiguous instrument to be an executory contract instead of a conveyance.

Chavez v. Beregere, 231 U. S. 482, 486, 487; aff'g
de Bergere v. Chavez, 14 N. M. 352, 93 Pac.
762;

Morse v. Salisbury, 48 N. Y. 636, 644, 645,
650.

The paper was carefully prepared and gave to Mr. Bouldin the right to take possession of the land. If the paper had been considered an absolute conveyance of a two-thirds interest, such a provision would not have been inserted, as any holder of an undivided interest has the right to take full possession of the whole property.

Furthermore, the possession was to be as agent or attorney for the Watts heirs, not only as to Baca Float No. 3, but also as to "any lands or land certificates granted in lieu thereof." As Mr. Bouldin would be in possession "of the whole or any part" as agent or attorney for the Watts heirs, he would be estopped from denying their full title thereto.

Conveyance in Aid of Power

The addition of a power of attorney to act *for the Watts heirs* in taking possession of the property, to receive *as their attorney other property in lieu thereof*, and to sell or dispose *as their attorney* of the whole or any part, limits the words of conveyance to the extent necessary to effectuate the power.

Taylor v. Burns, 203 U. S. 120; aff'g 8 Ariz.
463, 76 Pac., 623.

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510.

Cooper v. Mayfield, 57 S. W. 48; aff'd in 58 S.
W. 827, 94 Tex. 107.

Taylor v. Taul, 32 S. W. 866; 88 Tex. 665.

As the United States Supreme Court said in *Taylor v. Burus, supra*, in affirming the decision of the Supreme Court of Arizona, with reference to a similar paper:

*the words of conveyance can have no more effect on the title than is necessary to accomplish the purpose of the transaction; "the purpose here named was the giving of authority. * * * For this it is not necessary to pass title with authority. And it is not ordinarily to be expected that an owner will part with title before the receipt of purchase price or security therefor."*

No Partition or Settlement

Mr. Bouldin was very careful not to convey any interest in any title which he thought he had acquired from the alleged California heirs of Baca. The paper contemplated a settlement between Mr. Bouldin and the Watts heirs, but only on the future division of the proceeds of Mr. Bouldin's success.

There can be no present partition without words of mutual conveyance. As the interest of the Watts heirs under the deeds from the alleged California heirs to Mr. Bouldin would only take effect at the time when the Watts heirs "are to have" a net one-third, it follows that Mr. Bouldin received no present interest in the existing title of the Watts heirs, as mutuality is the essence of all partitions.

Nor was there any present settlement between the parties. There was an "accord" as to what would be

received under stipulated conditions, but no attempt by Mr. Bouldin to give present "satisfaction" out of his alleged interest under the two California deeds. It is trite law that even an unconditional accord without satisfaction is a nullity.

Future Division

The provision in the paper that the Watts heirs "are to have" a net one-third of what was secured by Mr. Bouldin shows that a future vesting and division was contemplated.

Taylor v. Taul, 32 S. W. 866, 867, 868; 88 Tex. 665;

Foster v. Foster, 83 Eng. Full Reprint 294, 1 Levinz 55; K. B. Div. Charles II; cited with approval in 37 Pa. 201 (78 Am. Dec. 414) and in 33 Pa. 247.

The contemplated future division and the recognition that indemnity land, land certificates, cash or "other property" would pass directly to the Watts heirs both show that a future conveyance by the Watts heirs to Mr. Bouldin was impliedly contemplated, especially as there can be no present conveyance of something which may later come into existence.

Cooper v. Mayfield, 57 S. W. 48, 50; aff'd in 58 S. W. 827, 94 Tex. 107;

Hazlett v. Harwood, 16 S. W. 310; 80 Tex. 510.

Even if the future conveyance was not expressly contracted for it is implied by law from the construction

of the agreement that Mr. Bouldin should have a certain share on the performance of his covenants. When an instrument expressly or impliedly contemplates a future conveyance, it is always deemed an executory contract.

The parties did not contemplate that the Watts heirs would have anything until "the final and complete settlement of the titles to said land and all matters connected therewith," and then only what might be "recovered and secured" by Mr. Bouldin, at which time it was stated that the Watts heirs "are to have" a net one-third. Certainly Mr. Bouldin could not get his share until his clients received theirs.

Attorney's Interest Subject to Diminution

Mr. Bouldin's contemplated two-thirds interest was made subject to diminution; he was bound to deliver an absolutely net one-third of the land recovered. The exercise of his power to mortgage might alone exhaust his own entire interest.

He was also bound to compromise with the existing claims of title, not only as to the Tumacacori, Calabasas and Sonoita claims, but also any claims under the Hawley deed, and to overcome the contentions of the Land Department at that time that discovery of mineral on the Float would revert title *pro tanto* in the United States, even if the location had been previously approved; in these compromises certain concessions were expected to be made.

It was understood that the Watts heirs should receive a net one-third of the lands recovered and Mr. Bouldin

the balance, but that out of his two-thirds interest he was to pay all the expense and bear all the adjustments by way of compromise.

The natural consequence of the contentions of our adversaries is that Mr. Bouldin would be in a better position if he broke his contract than if he performed it. The absurdity of such a consequence proves the falsity of the premise on which it is founded.

No Reward Without Effort

In 1884 the Land Department did not recognize the 1863 location as "approved." It was made incumbent upon Mr. Bouldin to secure a recognition of such approval by judicial decree or otherwise. This he made no attempt to do.

If the result in 1914 of litigation over Baca Float No. 3—litigation had long after Mr. Bouldin's death and conducted by adverse parties—is allowed to be read into the paper, it is absolutely void, as a contract impossible of performance. *If there was nothing for Mr. Bouldin to do, he certainly would not receive therefor the rewards for the contemplated efforts and expenditures on his part (Hallett v. Harwood, 16 S. W. 310; 80 Tex. 510).*

Comparsion with Paper from California "Heirs"

In 1878, Mr. Bouldin secured two instruments from alleged heirs of Baca, living in California, and recorded them in Pima County.

The two California papers are alike; but the instrument of September 30, 1884 contains some noteworthy changes, although the general form is quite similar:

1. The California papers recite a consideration of one dollar, "and the further consideration as hereinafter express^d"; while the instrument of September 30, 1884, after giving the nominal consideration of one dollar, is based upon "the further considerations, covenants and agreements *to be performed* by the party of the second part, as hereinafter mentioned." *Performance by Mr. Bouldin was therefore made a distinct inducement and consideration of the paper of September 30, 1884, but the California papers were given for the mere promise.*

* 3. In the paper of September 30, 1884, after a statement of Mr. Bouldin's agreements similar to that in the papers of 1878, the following appears:

"And upon the final and complete settlement of the titles to said lands, and all matters connected therewith, the parties of the first part are to have, own and possess in fee an undivided one-third of the net land certificates obtained, and an undivided one-third of all moneys and other property recovered and secured by the party of the second part, net".

As the Watts heirs were to have a net one-third interest, and that only "on the final and complete settlement of the titles to said lands, and all matters connected therewith," it follows that Mr. Bouldin could not have been given, *in praesenti*, an

absolute two-thirds interest in the properties, because the natural sequence to the quoted clause is that Mr. Bouldin should have what was left; in other words, the quoted clause was intended to establish in the Watts heirs a primary interest in everything "recovered and secured" by Mr. Bouldin.

4. The California papers were most carefully acknowledged, but the Watts paper was not. The only logical inference is that the paper of September 30, 1884, was mutually deemed an executory or contingent retainer contract, which did not require an acknowledgment.

Summary

Forms of conveyance are so well established and so well known that the slightest deviation therefrom or addition thereto subjects an instrument to judicial construction. In the instrument at bar, the additions to the ordinary form of conveyance are so radical, the size and uncertainty of subject matter so pronounced, the method of execution so unusual, that it is the irresistible conclusion that something radically different from an ordinary conveyance was intended. As the instrument shows that something different from an ordinary conveyance was intended, it follows inevitably that the instrument is not a conveyance.

The primary consideration and condition for the paper was expressly made the performance of Mr. Bouldin's agreements. The Court, in construing the paper, must place itself with the parties at the time of the execution

of the paper. Had the question then arisen as to what would happen in case Mr. Bouldin did not perform his agreements, the inevitable answer from both parties would have been that the instrument at bar would be a nullity. This must be the judicial inference from the form of the paper, the circumstances under which it was executed, and the situation of the parties at the time.

Subsequent Conduct of Mr. Bouldin

The activities of Mr. Bouldin, subsequent to September 30, 1884, with reference to Baca Float No. 3, or any location or attempted relocation thereof, are disclosed by the record as follows:

1. In Mr. Bouldin's letter of November 25, 1884, to John Watts, less than three months after the paper was executed, he states:

"My being sick has very materially interfered with my business arrangements and has also been the cause of my not sending you the certified copy of our *agreement*. Had I thought it was very material, or that you thought so, I should have taken pains to have it copied, certified and sent to you."

This letter and its subject matter were identified by Mr. Watts (P. R. 415, 301).

2. In the deed of February 21, 1885, to John Ireland and Wilbur H. King (P. R. 312), Mr. Bouldin conveyed:

“An undivided one-third of one-third of all right, title and interest, *owned and controlled and possessed*”

by him in the location of 1863, or anything received in lieu thereof. It is clear that he did not believe that he had an absolute undivided two-thirds interest in the property, under his contract with John Watts, executed less than five months before. The “right, title and interest” which Mr. Bouldin then thought he “owned” was that under the deeds to him from the California heirs, and what he “controlled and possessed” was his contingent interest under the instrument of September 30, 1884. The statement of the fractional interest conveyed is also most extraordinary.

3. On June 8, 1885, Mr. Bouldin entered into an agreement with Mr. Robinson, by which they mutually agreed to proceed to carry out the provisions of the order of the Commissioner of the General Land Office, dated March 12, 1885, authorizing Mr. Robinson to relocate the grant, and stipulated for an equal division of the benefits thereof.
4. In October, 1887, Mr. Bouldin mortgaged to Rifenburg 12,500 acres by specific description in the northwest corner of the 1866 tract.
5. On October 16, 1888, shortly before his \$5,000 note to Messrs. Ireland and Kings became due, Mr. Bouldin and his wife conveyed to their sons, David W. Bouldin, Jr. and Powhatan W. Bouldin, the undi-

- vided one-half interest in and to the 1866 tract.
6. On August 23, 1892, shortly before the suit brought against him in Pima County by Messrs. Ireland and King, Mr. Bouldin conveyed unto his sons, Powhatan W. Bouldin and James E. Bouldin, all of his right, title and interest of, in and to the 1866 location.
 7. By partition deeds, dated November 12 and 19, 1892, between Mr. Robinson on the one part and Mr. Bouldin, *as attorney in fact for his sons, Powhatan W. Bouldin and James E. Bouldin, and his daughter-in-law, Lucy Bouldin*, on the other part, after reciting other partition deeds, there was conveyed to Mr. Robinson the southerly half of the 1866 tract and to the Bouldins the northerly half of that tract.
 8. In Mr. Bouldin's answer, filed May 10, 1893, by Mr. Franklin as his attorney, in the suit brought against him in Pima County by Messrs. Ireland and King, he alleges that his \$5,000 note to them was given for the purchase price of an interest in Baca Float No. 3, and that there was a failure of consideration because the payees had no title whatsoever thereto. Messrs. Ireland and King claimed only under the instrument, executed to them by Mr. Bouldin himself on February 21, 1885; and if that passed no title, it was because Mr. Bouldin then had none to convey; and if he then had none to convey, the instrument of September 30, 1884 passed no title. In that same action, Mr. Bouldin's alleged interest in the 1863 location had

been attached by the plaintiffs, prior to the filing of the answer above referred to.

9. The various conveyances by Mr. Bouldin's relatives, after his death, and down to the conveyance by James E. Bouldin to Jennie N. Bouldin of June, 1913, show that they then claimed no interest in the 1863 tract, but only to the northerly half of the 1866 tract, "purchased" by Mr. Bouldin himself from Mr. Robinson. In the deed of June, 1913, James E. Bouldin conveyed "the undivided one-half of the north one-half" of the 1863 location evidently thinking he was conveying his interest therein under the partitions with Robinson.

Such is the written record of Mr. Bouldin's activities, a record made at a time when his acts would be the best evidence of what he believed his rights to be.

Summary of Mr. Bouldin's Acts

The mere summary of Mr. Bouldin's acts is fatal to the contentions of his successors in interest:

1. After the agreement of June 8, 1885, between Mr. Robinson and Mr. Bouldin, the latter paid no attention to the 1863 tract, but confined his activities to the 1866 tract, in which the Watts heirs had no interest whatsoever.
2. In his deeds to his sons, he conveyed only a divided or undivided interest in the 1866 location, and stated that his interest therein was a *full one-half*, which he had acquired *by purchase* for them.

The testimony of John Watts shows that neither he or his family received any money whatsoever from Mr. Bouldin; and, therefore, the "purchase" must have been of the interest which Mr. Bouldin acquired from Mr. Robinson.

3. By omitting any mention of the 1863 tract in any of the deeds to his sons, Mr. Bouldin admitted that he had no interest therein. The evident motive for these deeds was protection against the \$5,000 note to Ireland and King; certainly if he thought he had any interest in the 1863 location he would have covered that up also.
4. The record is clear and convincing that after conferences with Mr. Robinson in Washington, culminating in their written agreement executed there on June 8, 1885, Mr. Bouldin became convinced that it was to his interest to abandon and repudiate his contract of September 30, 1884 with John Watts, and work with Mr. Robinson. It is very evident that while in Washington Mr. Bouldin became discouraged as to any future for the 1863 location, with conflicting Mexican grants clouding its title, and covering its entire agricultural land and water supply. Association with the Robinson title afforded more opportunities for his peculiar talents.
5. There is not the slightest evidence that Mr. Bouldin ever made any attempt to secure the recognition of the 1863 location. He did nothing in the Land Department or elsewhere to accomplish that end.

Abandonment of Contract.

We believe the foregoing summary is absolutely convincing that Mr. Bouldin from June, 1885, to the date of his death, did nothing for the Watts heirs; and not only abandoned their retainer, but repudiated his agreement with them, by associating himself with a hostile interest. After June, 1885, in his various recorded papers, he did not deem his contingent interest in the 1863 tract even worth mentioning, nor did he have any known transaction therewith.

The financial difficulties of Mr. Bouldin with Messrs. Ireland and King, culminating in their judgment against his administrator in Pima County, show that he abandoned also his agreement with them of February 21, 1885, with reference to the same location, and that in 1888 they had forced him to give them a \$5,000 note in settlement.

Transactions not chargeable against us

1. Mr. Bouldin, in his transaction with Messrs. Ireland and King, and in all his transactions with Mr. Robinson, expressly acted in his own behalf, or in behalf of his sons, and not in behalf of the Watts heirs.
2. In all his transactions, except that with Messrs. Ireland and King, Mr. Bouldin, dealt only with the 1866 tract or some attempted relocation thereof, and not with the 1863 tract.

3. The instrument of September 30, 1884 did not give Mr. Bouldin any power to partition.
4. His transaction with Ireland and King was merely an employment of sub-contractors.

Mr. Bouldin did not act for Watts heirs

It is elementary that an attorney-in-fact must act not only in behalf of his principals, but also in their names.

Clarke v. Courtney, 5 Pet. 319

Whitney v. Wyman, 101 U. S. 392

Hunt v. Rousmanier, 8 Wheat. 174

Nowhere in this record is there a single paper executed by Mr. Bouldin in behalf of the Watts heirs, nor one that was even supposed to be for their benefit.

In his partitions with Mr. Robinson, Mr. Bouldin clearly and emphatically stated that he was acting as attorney-in-fact for his sons; and in his conveyances to his sons, Mr. Bouldin conveyed the interest in the 1866 location which he had "purchased" for them with their money (P. R. 90). This assertion of an adverse interest, and association with a hostile party, absolutely terminated the agency.

Hill v. Conrad, 43 S. W. 789; 91 Tex. 341;

Colton v. Rand, 51 S. W. 838, 842, 53 S. W. 343;
93 Tex. 7;

Case v. Jennings, 17 Tex. 661, 672, 673;

In re Watkins, 53 Pac. 702; 121 Cal. 327.

Certainly the acts of an agent, done not in the name of the principal, but in the name and behalf of another, are of no avail against the principal.

Burden of Proof to Show Performance

Treating the Bouldin paper as an executory or contingent retainer contract, it is clearly incumbent upon those who claim under Mr. Bouldin to show that he performed his part of the contract.

Haslett v. Harwood, 16 S. W. 310, 311; 80 Te
510

Taylor v. Taul, 32 S. W. 866, 867; 88 Tex. 665

Dreisbach v. Serfass, 126 Pa. 32, 40, 41; 17 Atl.
513; 3 L. R. A. 836

Williams v. Bentley, 27 Pa. 294

Dunnaway v. Day, 63 S. W. 731, 734; 163 Mo.
415

Recording Conferred No Benefit

Of course the mere recording of the Bouldin paper added nothing to its efficacy (*Davis v. Martin*, 8 Pa. Super. Ct. 133, 141). In all or nearly all of the cases heretofore cited, the instrument had been recorded before the litigation.

Essentials to Specific Performance

As Mr. Bouldin's successors must seek the equivalent of specific performance, they must not only show per-

formance, but meet the requirements which a court of equity deems essential to the granting of such a decree, instead of relegating them to their remedy at law (*Williams v. Bentley*, 27 Pa. 294, 300; *Dreisbach v. Serfass*, 126 Pa. 32, 41; 17 Atl. 513, 3 LRA. 836).

Under well-known equitable rules, specific performance is never awarded if the applicant therefor has been guilty of overreaching (36 Cyc. 615); or if the contract is unfair (36 Cyc. 612); or if the applicant has been guilty of laches (36 Cyc. 721 to 724), especially where there has been a great enhancement of value in the meantime (36 Cyc. 726; *Patterson v. Hewitt*, 195 U. S. 309); or if third parties have succeeded in doing what the ancestor of the applicants agreed to do (36 Cyc. 619, 725).

Instrument Revoked by Deaths

It is elementary that where a contract requires a man's personal services or gives him any discretionary power, it ceases to operate on his death.

We have the right to choose the recipients of our confidence. No matter how able and trustworthy a man's legal representative may be, they have no right to perform a contract made with their decedent, in so far as it looked to his personal services or his discretionary judgment.

Power Not Coupled With Interest

A power coupled with an interest is one that exists in the subject matter of the power, and not merely in what is produced by the exercise of the power. As Mr.

Bouldin's interest existed only in the proceeds arising from an execution of the power, it was not a power coupled with an interest. An interest in the proceeds by way of compensation is not such an interest as renders the power irrevocable or "coupled with an interest."

Hunt v. Rousmanier, 8 Wheat. 174, 204

Taylor v. Burns, 203 U. S. 120, 126

Taylor v. Burns, 8 Ariz. 463; 76 Pac. 623

Trickey v. Crowe, 204 U. S. 228, 240

Trickey v. Crowe, 8 Ariz. 176

Power Long Since Terminated

Even if the power was for a consideration made irrevocable, it did not survive the death in 1893 of Mrs. John S. Watts, one of the joint principals.

Hunt v. Rousmanier, 8 Wheat. 174, 207

Long v. Thayer, 150 U. S. 520, 522

Galt v. Galloway, 4 Pet. 332, 344

Trickey v. Crowe, 204 U. S. 228, 240

Green v. Tuttle, 5 Ariz. 179; 48 Pac. 1009

The power certainly terminated on Mr. Bouldin's death, as it called for his personal services and confided in him a wide discretion.

1 *A. & E. Ency. Law* (2nd Ed.) 1226

Howe S. M. Co. v. Rosensteel, 24 Fed. 583

Bancroft v. Scribner, 72 Fed. 988, 991

Love v. Peel, 95 S. W. 998, 1000; 79 Ark. 366

Bristol S. Bank v. Holley, 58 Atl. 691, 692; 77
Conn. 225

Ryder v. Johnson, 45 So. 181 183; Ala.

Mills v. Union C. L. I. Co., 28 So. 954; 77 Miss.
327; 78 A. S. R. 522

The power undoubtedly terminated on the death of the widow of Judge Watts, because Mr. Bouldin's employment was in a joint contract; and from the nature of his authority, it could not be exercised except in behalf of the entire interest of the Watts heirs, free from any complication because of any creditors of the widow.

The employment certainly terminated on Mr. Bouldin's death; and thereafter no one in his behalf, or in behalf of his successors, had the right to assume to act for the Watts heirs under the contract. No one in fact did.

Conclusion

The instrument of September 30, 1884 is nothing but an executory contract. It was never performed by Mr. Bouldin but abandoned by him less than a year after it was executed. More than ten years ago, it was terminated by deaths.

If it is a conveyance, then there is no proof of lawful authority in John Watts to execute the instrument in behalf of his mother, brother and three sisters; and if not entirely void under U. S. ~~R.~~ S. §3477, it is good only for a one-fifteenth interest.

Certainly there is not a vestige of moral right in the contentions of those who claim under Mr. Bouldin.

PRAYER FOR REVERSAL

The decree should be reversed; and a mandate should issue, directing the lower court to enter a decree adjudicating and quieting the title of Santa Cruz Development Company to the entire tract at bar (except in so far as its title to the Alto mining property in the northeast corner was divested by a tax sale in June, 1914), and removing as clouds upon its title all instruments purporting to inure to the benefit of any of the other parties to this action.

New York City, January 19, 1916.

Respectfully submitted,

G. H. BREVILLIER,
Counsel for Santa Cruz Development Company.

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United States Circuit Court of Appeals FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,
vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., JAMES E.
BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN
LEE BOULDIN,
Appellees.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellants,
vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and
HELEN LEE BOULDIN,
Appellants,
vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,
Appellant,
vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., ET AL.,
Appellees.

Appellants' Brief as to Claim that there was a Nineteenth Heir of Luis Maria Baca, named Antonio.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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JOSEPH E. WISE and LUCIA J. WISE, Appel-
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C. T. DAVIS, JR., JAMES E. BOULDIN,
JENNIE N. BOULDIN, DAVID W. BOULDIN
and HELEN LEE BOULDIN, Appellees.

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, JR., Appellants, v. JOSEPH E. WISE
and MARGARET W. WISE, Appellees.

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID
W. BOULDIN and HELEN LEE BOULDIN, Ap-
pellants, v. JOSEPH E. WISE and MARGA-
RET W. WISE, Appellees.

SANTA CRUZ DEVELOPMENT COMPANY, a Cor-
poration, Appellant, v. CORNELIUS C. WATTS,
DABNEY C. T. DAVIS, JR., *et al.*, Appellees.

APPELLANTS' BRIEF AS TO THE CLAIM THAT THERE WAS A NINETEENTH HEIR OF LUIS MARIA BACA, NAMED ANTONIO.

Statement of the Case.

These are cross-appeals (rec., p. 404) by Cornelius C. Watts and Dabney C. T. Davis, Jr., plaintiffs below, and the Santa

Cruz Development Company and James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, defendants below, from that portion of the decree of the court below entered herein November 1, 1915 (rec., p. 536), that recognizes the title of Joseph E. Wise and Margaret W. Wise, defendants below, to an undivided one-thirty-eighth each of the land, the title to which is sought to be quieted in this action.

The action was brought in the District Court of the United States for the District of Arizona to quiet the title to a certain tract of land situated in Santa Cruz County, State of Arizona, particularly described in the complaint (rec., pp. 3-25).

The plaintiffs below, Watts and Davis, claim title to the south half of said land as successors in title to one John S. Watts, to whom they claim that the heirs of Luis Maria Baca, to whom the United States by act of Congress of June 21, 1860, granted the land, conveyed it; and the defendants below James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin claim the north half of the land by the same line of title; and the defendant below, Santa Cruz Development Company claims under John S. Watts but principally by a different line of title.

The defendants below, Joseph E. Wise and Margaret W. Wise, claim, among other things, that there was another heir of Luis Maria Baca, named Antonio Baca or Jose Antonio Baca, whose interests were not conveyed to Watts, and that they are the successors in title to said Antonio, whose interest was an undivided one-nineteenth (rec., pp. 63, 64).

The Court below found in favor of this claim of the defendants Wises; and from that portion of the decree these appellants appeal.

The history of the grant is set out under Point II, *infra*.

This brief is filed jointly on behalf of those who oppose the claim that there was a nineteenth heir of Luis Maria Baca named Antonio entitled to inherit; and will be confined strictly to that one question.

The parties on whose behalf this brief is filed are also filing separate briefs on the main appeals in which their interests are diverse, and in those briefs the general features of the case are treated.

Specification of Errors.

The assignment of errors of the appellants, Cornelius C. Watts and Dabney C. T. Davis, Jr., and the Bouldins are set out at length in the record (pp. 581, 602) and may be grouped as follows :

Error is alleged in the decree below so far as it recognizes title in Joseph E. Wise and Margaret W. Wise each to an undivided one-thirty-eighth interest in the land and quieted the title thereto in them ; and so far as such decree did not find the title to the south half of the land in Watts and Davis and the north half to the Bouldins and did not adjudicate that neither Joseph E. Wise nor Margaret W. Wise had any title to the land or to any part thereof.

Error is alleged in the admission of certain deeds on the ground that the grantors in said deeds were not shown to have had any interest in the land at the time of such conveyances for the reasons specifically set out in the assignments.

Error is alleged in admitting and not excluding the testimony of Marcos C. de Baca as to alleged statements of Prudencio, Tomas, Manuel and Domingo Baca as to the relationship of Antonio Baca to Luis Maria Baca on the grounds, among others, that such statements were not made *ante litem motam* ; that the declarants had executed deeds previously by which they purported to convey the title to the whole tract ; that such deeds contained recitals and covenant that the grantors in said deeds were all the heirs of Luis Maria Baca.

Error is alleged in rendering judgment for Joseph E. Wise and Margaret W. Wise on the ground that it was clearly

against the weight of the evidence and that there was no competent evidence to support it.

Error is alleged in admitting the testimony of Marcos C. de Baca as to the statements of Prudencio, Tomas, Manuel and Domingo Baca on the ground that each of said persons covenanted in the deed under which these appellants and Joseph E. Wise claim that they were seized in fee and had good right to convey the land and neither Antonio nor his heirs were mentioned in said deed.

Error is alleged in admitting the testimony of Marcos C. de Baca as to the statements of Prudencio, Tomas, Manuel and Domingo Baca on the ground that they were in derogation of the title conveyed by said persons to the predecessors in title of these appellants and made subsequently to the transfer of title.

Error is alleged in admitting the alleged will of Luis Maria Baca, the petition of the executor accompanying the will and an order referring the petition to an Alcalde for hearing on the grounds, among others, that they did not tend to prove any issue in the case, that they showed that Luis Maria Baca had a deceased son, that such deceased son had received advancements and was not entitled to inherit, that it does not appear that the adjudication was in favor of the heirs of the alleged Antonio, and that the act of June 21, 1860, granted the land to the heirs of Luis Maria Baca who made claim to the Las Vegas grant and that no claim to said grant was presented on behalf of the alleged Antonio nor of his heirs.

The Santa Cruz Development Company assigned the same errors (rec., p. 623), except that it does not join in assigning error as to the portion of the decree which did not find the title to the south half of the tract in Watts and Davis and the title to the north half in the Bouldins.

POINTS.

I.

There is no proof that Luis Maria Baca had a nineteenth heir named Antonio, entitled to inherit ; and there is proof that he had only eighteen heirs.

An examination of the record shows that the claim as to Antonio rests solely and entirely on the testimony of the witness Marcos C. de Baca as to what was told him by certain sons of Luis Maria Baca.

There is not a bit of writing produced in which the name of Antonio appears, except certain lists and deeds prepared by Marcos himself. A certified copy of what purports to be the Will of Luis Maria Baca, a petition of Baca's executor and an order referring the petition to an Alcalde was produced, but no mention of Antonio is to be found in them.

Contradiction of Baca's Testimony.

A petition (Santa Cruz Development Company, Exhibit 1, rec., p. 403) was filed by John S. Watts, on behalf of the heirs of Luis Maria Baca, June 19, 1855, with the surveyor general for the confirmation of the Las Vegas grant under the direction and from information furnished by Tomas Cabiza de Baca, the father of Marcos (rec., pp. 329, 375), and grandson of Luis Maria Baca (rec., p. 330), by whom he (Watts) was employed (rec., pp. 353, 375). Tomas had for a long time been working on the claims (rec., p. 351), and up to 1873 and 1875 acted as agent for the Baca heirs (rec., p. 374). When in New Mexico, Watts made his home at the house of Tomas de Baca (rec., p. 375). This petition gives the names of the sons of Luis Maria Baca,

who were living and the representatives of those who were dead, but makes no mention of Antonio.

The petition (Plaintiff's Exhibit E, rec., p. 165) filed later, October 17, 1856, in reference to the Ojo del Espiritu Santo grant by the same John S. Watts on behalf of the heirs of Luis Maria Baca gives a list which it declares to be all the living children and grandchildren of Luis Maria Baca, and there is no mention therein of Antonio or any descendants of his.

On May 1, 1864, a deed was made to the same John S. Watts (Plaintiff's Exhibit C, rec., p. 154) by various Bacas, including the father of Marcos, but it makes no reference to Antonio or any descendants of his.

On May 30, 1871, another deed (Plaintiff's Exhibit O, rec., p. 197) was made to the same John S. Watts by the heirs of Luis Maria Baca, including the father of said Marcos, who Marcos testified was a truthful, honest man and that he would believe anything he told him (rec., p. 363), in which deed there was a covenant that the grantors were "the sole lawful heirs of Luis Maria Baca", but there is no Antonio or any descendents of his mentioned in that deed.

The petitions, presented to the surveyor general as to the Las Vegas and Ojo del Espiritu grants, were both supported by the testimony of persons who knew Luis Maria Baca and his children (Plaintiffs' Exhibit F, rec., p. 169, Santa Cruz Development Company Exhibit 2, rec., p. 405). Among them was Jose Francisco Salas. He testified that he had examined the lists set forth in said petitions and that they were correct lists of the names of all the children of Luis Maria Baca then living; also of the heirs of those that were dead; but such lists did not include Antonio nor any legal representatives of his.

Here, therefore, is a claim of title under a man who was dead in 1827 (rec., pp. 339, 376), when Luis Maria Baca died (rec., p. 338). On whose behalf no claim was made when

the interest in this land of the heirs of Luis Maria Baca was disposed of to Watts, either on May 1, 1864, or May 30, 1871, when the deeds (Plaintiffs' Exhibit C, rec., p. 154; Plaintiffs' Exhibit O, rec., p. 197) were executed. On whose behalf claim was never made until this litigation was pending, and the defendant, Joseph E. Wise, went to Mexico and retained Marcos (rec., p. 371). Marcos then, for a consideration (rec., p. 372), procured deeds to himself from, as he says, reputed heirs of Luis Maria Baca (rec., p. 372), and then conveyed such interest to the defendants, Wises (rec., p. 261). This claim rests entirely on the unsupported testimony of Marcos, the persons from whom he got the deeds not even being produced to tell their story.

Joseph E. Wise is Estopped to Assert the Heirship of Antonio.

So far as the defendant below, Joseph E. Wise, is concerned, the whole of the testimony of Marcos C. de Baca is inadmissible for the reason that said Wise claims an undivided two-thirds interest in the whole tract under the deeds (Plaintiffs' Exhibit C, rec., p. 154; Plaintiffs' Exhibit O, rec., p. 197) through the instrument dated September 30, 1884 (rec., p. 372) from the heirs of John S. Watts to David W. Bouldin and can not therefore attack the title conveyed by the deeds to John S. Watts by grantors who covenanted that they were all the heirs of Luis Maria Baca and were seized in fee and had good right to convey the same.

Objection on this ground was seasonably made and an exception taken (rec., p. 331).

Watts and Davis, the Bouldins and the Santa Cruz Development Company and Joseph E. Wise all claim under a common source of title, that is the deeds from the heirs of Baca to John S. Watts, dated May 1, 1864 (Plaintiffs' Exhibit

C, rec., p. 154) and May 30, 1871 (Plaintiffs Exhibit O, rec., p. 197).

The rule is well established that where two persons claim under a common grantor, neither can attack the title of the common grantor or deny that he had a valid title at the time of the conveyance.

In *Robertson v. Pickrell*, 109 U. S., 608, the Court quotes from *Blight's Lessee v. Rochester*, 7 Wheat., 535, at 548, as follows (p. 615) :

“The property having become by the sale the property of the vendee he has the right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this nor is either the letter or spirit of the contract violated by it.”

And the Court then continues (p. 615) :

“To this general statement of the law there is this qualification: That a grantee can not dispute his grantor's title at the time of the conveyance so as to avoid the payment of the purchase price of the property; nor can the grantee in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by another. In other words he can not assert that title obtained from the grantor or through him is sufficient for his protection and not available to the contestant. When both parties assert title from a common grantor neither can deny that such grantor had a valid title when he executed the conveyance.”

Attention is called to the fact that as to the two-thirds interest Joseph E. Wise claims solely under the instrument (rec., p. 272), from the heirs of Watts to Bouldin; that he makes no claim to have acquired from another source any title to the two-thirds. The contention is that this being so he can not set up a title derived from another source which derogates from

the title to a part of the two-thirds and at the same time claim the remainder of the two-thirds under the title derived from the heirs of Watts.

In *Minor v. Powers*, 26 S. W., 1071, 1072; 87 Tex., 83; the Court said (p. 89):

“Both parties claim under a deed from persons claiming to be the only heirs of Walsh, and in that deed they were so recited to be. Defendants can not claim under this deed as from the only heirs of Walsh and deny the truth of the recitals as to the plaintiff.”

The foregoing might have been written of the case at bar; it is so apt in its application to the facts, since, in the deed of May 30, 1871, from the Baca heirs to Watts, the grantors covenanted that they were all the heirs.

Other cases supporting the same proposition are:

Gibson v. Lyon, 115 U. S., 447.

Bethea v. Allen, 95 S. C., 479, 484; 79 S. E., 639.

Testimony of Marcos C. de Baca.

Marcos C. de Baca testified that at the time of the hearing, March, 1915, he was fifty-eight years old (rec., p. 329), a lawyer admitted to practice in the District Court of New Mexico in 1889 and in the Supreme Court in 1891 (rec., pp. 329, 371); that he was a great grandson of Luis Maria Baca (rec., p. 329) being a son of Tomas Cabeza de Baca who was a son of Juan Antonio Cabeza de Baca (rec., p. 330) that his father's full name was Francisco Tomas Cabeza de Baca which he sometimes signed Francisco and sometimes Tomas (rec., p. 330) that his father was a party to the deed of May 1, 1864 (Plaintiffs' Exhibit C, rec., pp. 154-163) and that his signature thereto was genuine (rec., p. 329); that he would believe anything his father told him as his father was an honest truthful man (rec., pp. 363, 375); that

his father told him "everything about the family" (rec., p. 347); that his father as far back as 1869 (rec., p. 351) and for a long time thereafter acted for the Baca heirs in connection with their claims to these grants (rec., p. 374); that his father was prominent among the Americans as well as the Mexicans (rec., p. 375); that John S. Watts made his father's house his home (rec., p. 375); that his father employed John S. Watts to procure the confirmation of the grants (rec., p. 353); and that he thinks his father furnished John S. Watts the information on which he acted in the matter of the Las Vegas grant (rec., p. 375).

The witness testified that since 1875 he had made a study as to who the sons of Luis Maria Baca were (rec., p. 330), that the first object of it was to keep a full record of the family and afterwards it was for the object of finding out the heirs of Luis Maria Cabeza de Baca in some partition suits brought against the heirs as to some land that Luis Maria Baca owned in New Mexico (rec., p. 330).

After it had appeared in the course of the hearing that to make declarations as to pedigree admissible they must have been made *ante litem motam*, the witness having testified that partition suits as to Baca Location No. 1 and the Ojo del Espiritu Santo grant was begun early in 1875 (rec., pp. 341, 347), the witness testified that his first conversation with his great uncle, Prudencio, one of the declarants, took place at Pena Blanca, New Mexico, in the latter part of 1873 (rec., p. 346); that he had a notion to make a book of the family record from Luis Maria Baca to the present in 1873, when he left school (rec., p. 371), being then sixteen years old (rec., pp. 347, 350, 371), and that he was not interested in the matter at all except "to keep the record of the family, that is all" (rec., p. 361), "to find out the correct list of the family of Luis Maria Baca, for my own use." "I did not have any other" object (rec., p. 374).

The foregoing indicates some of the inconsistencies of Marcos' testimony and shows his willingness to change his testimony to meet the requirements of the case.

The witness testified that he was acquainted with Prudencio Baca, Jesus Maria Baca, the first, Jesus Maria Baca, the second, Domingo Baca and Manuel Baca, sons of Luis Maria Baca, and Josefa Baca y Lucero, a daughter ; that Prudencio died in March, 1882, the two Jesuses died about 1868 or 1870, Josefa y Lucero died in 1888, Domingo died in 1892 and Manuel in 1905 (rec., p. 335) ; that in 1873 Prudencio, Manuel and Josefa lived at Pena Blanca (rec., p. 350) and the two Jesuses lived at Loma Parda in San Miguel County (rec., p. 350) ; that he had conversations with Prudencio, Domingo, Manuel and Josefa (rec., p. 336) ; and that his first conversation with Prudencio as to the relationship of Antonio to Luis Maria Baca was in the latter part of 1873 (rec., p. 346).

After objection had been made and overruled and exception taken to the witnesses' giving the substance of the conversations (rec., pp. 345, 355), on the ground that it was not shown that they were made *ante litem motam* but on the contrary it appeared that they were made *post litem motam*, the witness testified with regard to the conversation with Prudencio at Pena Blanca in 1873 " I was inquiring from him who the children of Luis Maria Baca were. He gave me the names, amongst them the name of Antonio Baca as the oldest child of of Luis Maria " (rec., p. 355).

The witness testified that he had another conversation with Prudencio ; it might have been nearly a year before the commencement of the partition suit (rec., p. 355), which he testified began early in 1875 (rec., p. 341), at which conversation witness showed Prudencio a list of the family, as he had got them, at the head of which he had the name of Antonio Lucero, sometimes called Jose Antonio, and Prudencio said that it was a correct list (rec., pp. 356, 358).

The witness testified that he had a conversation in 1875

prior to the bringing of the partition suit with Manuel Baca, a son of Luis Maria Baca, at his father's house in Pena Blanca, in which he inquired of Manuel also if the list which he had made of the family of Luis Maria Baca was correct or not, and that Manuel said that it was and "that Antonio was the oldest child of Luis Maria Cabeza de Baca" (rec., p. 359).

The witness also testified that he had a conversation in 1893 or 1894 in Pena Blanca with Domingo Baca, a son of Luis Maria Baca, in which conversation Domingo said that Antonio was a son of Luis Maria Baca (rec., p. 359).

The witness, using a paper, as it afterwards appeared, copied by him from papers of his father (rec., pp. 338, 339) testified, as if of his own knowledge, that there was a controversy in 1828 or 1829 after the death of both Luis Maria Baca and the alleged Antonio Baca between Francisca Garviso, who, the witness says, was the wife of Antonio Baca, and Miguel Baca, the brother and executor of Luis Maria Baca, as to the right of her children to inherit from Luis Maria Cabeza de Baca. The witness later admitted that his knowledge about the controversy was derived from the paper (rec., p. 338) and testified that from his information the controversy was about the indebtedness of Antonio at the time of his death to his father, Luis Maria Baca (rec., p. 340); that he was not himself acquainted with Francisca Garviso (rec., p. 361); that Francisca Garviso is dead as if of his own knowledge (rec., p. 361); that in 1873 Antonio was dead as if of his own knowledge (rec., p. 362); though when criticised for so doing he testified that he had been told so by Prudencio Baca and his father and that he believed them (rec., p. 363).

After objection that Prudencio was a party to the deed containing the covenant that the grantors were the sole lawful heirs of Luis Maria Baca as was the witness' father, Tomas Cabeza de Baca, and bound thereby and could not, after

having transferred the title, make statements in derogation of the title conveyed, had been overruled and exception taken (rec., p. 362), the witness testified that Prudencio told him in 1873 that Antonio Lucero, corrected on his counsel's suggestion to Antonio, left a child, whose name was Juan Manuel Baca, that he never knew Juan Manuel, that he was told by his father, by Prudencio and by Manuel that in 1873 Juan Manuel Baca was dead, that he left a widow, Feliciana Padilla, that witness does not remember ever meeting her, that he made inquiry, without saying of whom, as to her and ascertained that she died about 1882 (rec., pp. 362-364, 366); that he knew of his own knowledge that Juan Manuel Baca left children (rec., p. 366) and that their names were Jose, a son, and Preciliana, a daughter (rec., p. 366); that he knew Jose during his lifetime and that he died in 1905, leaving children (rec., p. 366); that Preciliana married Antonio Mares, and died leaving children (rec., pp. 366, 367); and, using a list prepared by his counsel from the deeds to the witness and presumably prepared by the witness (rec., p. 368), that the persons named in the deeds were all the descendants of Jose and Preciliana Baca (rec., p. 369).

The witness used to refresh his recollection what he stated was a list of the family of Luis Maria Baca made by himself and as to which he testified that since 1875 he has been engaged in making such list, that a family tree of Luis Maria Baca was filed in the partition suit as to Baca Location No. 1, and that the list he had was a copy of it (rec., p.); that he made various lists on scraps of paper, that he does not think he any longer has the list that he claimed to have shown Prudencio but that he had copies made from it, and that the copy of the list which he had in court was made between 1880 and 1884 (rec., pp. 356, 373); that he knew who the children were by the lists that he had (rec., p. 361); that he made lists of the family from the information furnished him by others and that

the list he had in Court was a copy made by him from various other lists (rec., p. 372).

The witness testified that about 1875 he was trying to find out who were the heirs of Luis Maria Baca in connection with certain partition suits as to land owned by Luis Maria Baca (rec., p. 330); that suits for the partition of Baca Location No. 1 and of the Ojo del Espiritu Santo grant were begun early in 1875 (rec., p. 347) and that in those suits they had to prove who the heirs of Luis Maria Baca were (rec., pp. 352, 354).

The witness testified that he did not know what was the outcome of those suits, or who were found therein to be the heirs and that he had never examined the record in them (rec., p. 377).

The Question is One of Heirship Rather Than of Pedigree.

There was introduced in evidence in support of the claim that there was an heir of Luis Maria Baca entitled to inherit named Antonio, a certified copy of what purported to be the will of Luis Maria Baca accompanied by a petition of his executor who was his brother Miguel and an order referring said petition for hearing to the Constitutional Alcalde of Cochiti (rec., p. 444).

Objection was seasonably made to its introduction on the grounds of incompetency, irrelevancy and immateriality (1) because while the papers showed that Luis Maria Baca had a son who predeceased him it did not appear that he was Antonio; (2) because it appeared from the papers that the deceased son, whatever his name, had received advancements more than equal to his share of the estate and was not entitled to inherit and was not therefore an heir nor were his wife, if he had one, or his children, if he left any; (3) because it appeared from the papers that the right of the deceased son to

inherit was referred to the courts and it does not appear what adjudication was made on it, or that it was in favor of the heirs of the deceased son, if he was Antonio; and (4) because the heirs of the alleged Antonio, if there were such, did not present their claim to the surveyor general and were not included among those to whom the grant was made by the sixth section of the Act of June 21, 1860.

This objection was overruled and an exception duly taken (rec., pp. 441, 442).

There is nothing in the will to indicate in any way that Luis Maria Baca had a son named Antonio.

The portion of the papers which it is claimed tend to prove the claim that Antonio was an heir of Luis Maria Baca are the following allegations of the petition of the executor:

“But as in this matter Franco Garviso, who was the wife of a son of my deceased brother, has been willing to make trouble claiming an equal part with other heirs, and being I instructed by my deceased brother, and appearing for the lists in the business the charge to the referred son of my brother, he has been satisfied of all his patrimony fatherly and motherly with great advantage to the others, out of the mentioned charge.”

Properly expressed the foregoing means that the executor had been instructed by his deceased brother and the books showed that the deceased son had been advanced all of his share of the estates both of his father and mother.

The question whether this allegation was true was referred to the Constitutional Alcalde of Cochiti to hear both parties and pass judgment according to justice, upon the principle that if the deceased son received an advancement during life it should be deducted from what he would otherwise be entitled to out of his father's estate (rec., pp. 447, 452).

No evidence was offered to show what the result of the

hearing was or that it was in favor of the claim of said Garviso.

It could not be said that this proved that the deceased son was an heir, or, if an heir, that he was entitled to inherit. The most that these papers can be claimed to prove is that there was a son who predeceased his father.

From these papers there was nothing to show that the deceased son's name was Antonio, so that it is only by the testimony of Marcos C. de Baca as to the statements of Prudencio, etc., that this deceased son is connected with Antonio.

If the deceased son was Antonio, then it is fair to assume that it was decided that he was not entitled to inherit from his father Luis Maria Baca, since neither in the petition filed by John S. Watts under the employment and direction and upon information furnished by Tomas Cabeza de Baca, a nephew of such deceased son, acting as agent for the heirs of Luis Maria Baca, with the surveyor general as to the Las Vegas grant nor in the amended petition presented by the same Watts under similar conditions to the surveyor general in regard to the Ojo del Espiritu Santo grant nor in the depositions in support of those petitions is Antonio or any of Antonio's descendants mentioned among the heirs of Luis Maria Baca. Further, neither he nor any of his descendants appear nor is any reference made to them in either of the deeds from the heirs of Luis Maria Baca to John S. Watts, dated May 1, 1864, and May 30, 1871, though several of his brothers were parties to such deeds, and in the latter it is covenanted that the grantors are the sole lawful heirs of Luis Maria Baca.

If the contention under Point II., *infra*, is sound that the claim on behalf of Antonio not having been presented to the Surveyor General, Antonio was not included in the grant made by the Act of June 21, 1860, this evidence was clearly inadmissible.

No claim is made, nor do the declarations of Tomas,

Prudencio, Domingo or Manuel, purport to state that Antonio was an heir of Luis Maria Baca. In other words such declarations were not offered nor could they have been offered to prove heirship, except so far as the fact of his being a son might bear on that question.

The burden of proving that there was an heir of Luis Maria Baca, named Antonio, entitled to inherit was on the defendants, Wises. The foregoing falls far short of sustaining this burden.

**On the Question of Pedigree, such Declarations
Were Inadmissible on the Following Grounds :**

(1) The declarations being made *post litem motam* were inadmissible not being within the pedigree rule.

(2) Tomas Cabeza de Baca, Prudencio Baca, Domingo Baca and Manuel Baca being grantors in said deeds, their declarations made after they had transferred the title in derogation thereof were inadmissible.

(3) Tomas Cabeza de Baca, Prudencio Baca, Domingo Baca and Manuel Baca were parties to said deeds and bound by the recitals and covenants thereof and estopped from contradicting them.

(4) Marcos C. de Baca having acquired the title which he afterwards conveyed to the Wises (rec., p. 261) was bound by the covenants and recitals in the deeds of his ancestor, Tomas Cabeza de Baca, and estopped from denying that the grantors therein were all the heirs of Luis Maria Baca.

Objection on the foregoing grounds was seasonably made and exception duly taken (rec., p. 364).

The first and second grounds of objection may be grouped for discussion. The deed of May 30, 1871 (Plaintiffs' Exhibit O, rec. p. 197), to which Marcos C. de Baca's father, Thomas Cabeza de Baca, Prudencio, Domingo and Manuel Baca were all parties, contained covenants (1) that the grantors

were the sole lawful heirs of Luis Maria Baca, were seized in fee of the land and had good right to convey the same; (2) that John S. Watts, his heirs and assigns should have quiet and peaceable possession; and (3) that the grantors warranted the title against the claims of the heirs of Luis Maria Baca and all persons claiming to be such heirs.

The grantors were bound by these covenants and estopped to deny them; and when Marcos C. de Baca, the descendant of Tomas, acquired the title it inured to his father's grantees and Marcos was also bound and estopped.

“The estoppel works upon the estate and binds the after acquired title as between parties and privies.”

Van Rensselaer v. Kearney, 11 How., 297, 325.

As to the Second Ground of Objection, it is Well Established that the Declarations of Grantors Made After the Transfer of Title in Derogation of the Title Transferred are not Receivable.

The following cases support the proposition that the declarations of a grantor after the transfer of title in derogation of the title conveyed by him are not admissible:

West v. Houston Oil Co., 136 F., 343, 348; 69 C. C. A., 169;

People v. Storrs, 207 N. Y., 147; 100 N. E., 730;

Conkling v. Weatherwax, 181 N. Y., 258; 73 N. E., 1028;

Jones v. Tennis Co., 94 S. W., 6;

Lang v. Metzger, 206 Ill., 475, 489; aff'g 101 Ill. App., 308;

Leonard v. Fleming, 13 N. D., 629; 102 N. W., 308;

Gowdy v. Gowdy, 83 S. C., 349; 65 S. E., 385.

Wigmore says (Section 1085): “Under the general principle (*ante*, 1080), statements made by the transferor of realty or personalty after the transfer of title are not receivable as

admissions against interest. This much is never disputed in the general application of the principle. There may, however, be other principles of evidence upon which such statements can be brought in; these are pointed out (*post*, 1087)."

Section 1087 does not mention declarations as to pedigree or the rule under which such declarations are admitted as one of the "other principles of evidence" to which Wigmore refers; and no case has been found which makes such declarations an exception to the general rule as to declarations of a grantor made after the transfer by him of the title in derogation of the title conveyed.

On the other hand, on principle, it would seem that declarations as to pedigree, if they serve to derogate from a title previously conveyed by the declarant, should not be admissible (1) because so far as they cut down the title of declarant they are not against interest and, under the general rule as to such statements, Wigmore says, if made after transfer of title, they are not admissible, and (2) to admit them would open the door to fraud and violate the very principle on which the general rule as to declarations in derogation of the title made after transfer of the title are excluded, that is to prevent just such frauds.

Such declarations, if admitted, could not be considered, as that would be to permit a grantor to defraud his grantee by depriving him of a portion and, if a portion, why not the whole of the property he had conveyed possibly at a large price. Since they could not be considered, it would be idle to admit such declarations.

When objection was made to Marcos C. de Baca testifying to declarations by Prudencio (*rec.*, p. 362), the Court asked "Can you estop a witness?" There is no question of estopping a witness but of preventing him from testifying to statements made by persons who had no right to make them and which could not be considered, and from testifying to matter that is inadmissible. Otherwise it would be necessary to let

him testify and then move to strike it out, which, in case there was a jury, might be fatal, since once heard the impression could not be removed from the minds of the jury.

Under the foregoing, the declarations testified to by Marcos C. de Baca as made to him by his father, Tomas Cabeza de Baca, and his great uncles Prudencio, Domingo and Manuel Baca, as to there having been an Antonio Baca, who was the oldest son of Luis Maria Baca, or as to his having married, or left children, were inadmissible and the objection made should have been sustained.

As to the First Ground of Objection, it was Not Shown that the Alleged Declarations of Tomas, Prudencio, Domingo and Mannel were made ante litem motam.

The rule as to the admissibility of declarations in regard to pedigree was very clearly stated by the Court below as follows (rec., p. 337): the declarant must be dead or his testimony unobtainable; the declarant must be related to the family, to which the declarations relate, by blood or marriage; and the declaration must have been made *ante litem motam* (*Fulkerson v. Holmes*, 117 U. S., 389; *Aalholm v. People*, 211 N. Y., 406, 412; *Young v. Schulenberg*, 165 N. Y., 385; *Mobley v. Pierce*, 87 S. E., 24).

It appears from the petition of the executor of Baca (rec., p. 448), as well as from the testimony of Marcos (rec., pp. 338, 340), that as early as 1828 there was a question as to whether the husband of Garviso, who Marcos says was Antonio, was an heir of Luis Maria Baca entitled to inherit. This controversy apparently existed in the early part of 1875 (rec., p. 330) when partition suits were brought to partition Location No. 1 and the Ojo del Espiritu Santo grant, in which the question was who were the heirs of Luis Maria Baca (rec., p. 352).

The testimony of Marcos as to the time of the declarations is based solely on memory. He made no claim that any of the lists had dates. In fact it appears they could not have had dates in view of Marcos' testimony that the list he had with him was made between 1880 and 1884, an interval of four years (rec., p. 373). The witness first fixes the time when he commenced his study as to the heirs in 1875 (rec., p. 330) about the time of the suits. His testimony as to the time of his conversation with Domingo is that it was in 1893 or 1894 (rec., p. 359) and he is very uncertain as to the time of his conversation with Manuel saying first that it was not prior to 1875, then that he did have a conversation with him in 1875 and finally, when asked by his counsel whether it was before the bringing of the partition suits said it was and, when urged to say how long before, says it may have been six months and it may have been a year (rec., p. 358) which, if the suits were brought as he testified early in 1875 (rec., p. 347) would contradict his previous testimony that he had no conversation with Manuel prior to 1875 (rec., p. 358).

From the foregoing it certainly can not be said that it appears that the declarations were made *ante litem motam*. The truth probably is that, in 1875 about the time the suits were brought Marcos C. de Baca who was then assisting his father (rec., p. 371), may have looked up the facts as to the heirs of Luis Maria Baca, as he testified (rec., p. 330), in which case the declarations would be inadmissible as not made *ante litem motam* (*Mobley v. Pierce*, 87 S. E., 24; *Fulkerson v. Holmes*, 117 U. S., 389; *Aalholm v. People*, 211 N. Y., 406, 412; *Young v. Schulenberg*, 165 N. Y., 385).

But it is immaterial whether the statements were made in 1873 or in 1875. It appears that there was a controversy in 1827 or 1828 as to who were the heirs of Luis Maria Baca. If partition suits to divide Baca Float No. 1 and the Ojo Es-
piritu Santo grant were begun early in 1875, it is entirely

probable that preparations for bringing such suits were begun as early or earlier than 1873 and that the question, which made such suits necessary, as that as to the heirs of Luis Maria Baca, were discussed even before preparations were begun.

The Testimony of Marcos C. de Baca is not Entitled to any Credence.

Marcos was an interested witness, interested to sustain the contention as to Antonio. He had been paid by Wise (rec., p. 372); and, having procured deeds to himself from the "reputed" heirs of Antonio (rec., p. 372) he was interested to prove that they were heirs and to sustain his representations in his deed to the Wises (rec., p. 261) that the persons from whom he had derived the title were the heirs of Antonio. Marcos subsequently conveyed to the defendants below Joseph E. Wise and Jesse H. Wise (rec., p. 261) whatever title he got under these deeds.

As said in *Jones on Evidence*, vol. 2, sec. 317:—

“Moreover it is evident that prejudiced and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and they can do so with comparative impunity from exposure or punishment. Evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency.”

And as said by Sir John Romilly in a leading English case reported in Book 52 of English Reprint, 382:

“slight reliance is to be paid to the declarations of deceased persons, said to have been made before, but remembered after the cause of litigation has arisen.”

At the time that Wise went to New Mexico and met Marcos the litigation in the District of Columbia was nearing its final stage and all the parties in interest knew that, as soon as the Supreme Court had rendered its decision, litigation would be begun in the local courts. It was consequently after the commencement of litigation that Marcos called to memory the statements which are so important to his version of the case.

When a witness testifies to declarations made by deceased persons, as Marcos C. de Baca does here, and especially when the declarations are said to have been made so long ago and no reason appears why the witness should remember them at this time except for the purposes of this suit, the testimony of such witness must be free of every vestige of doubt, which is the reverse of the case here as to the testimony of Marcos.

Marcos C. de Baca's testimony is inherently improbable, inconsistent and contradictory; is improbable in the light of human experience; is inconsistent with other evidence in the case and was given in a manner which showed the willingness of the the witness to testify to whatever was wanted of him to support his side of the case.

It is improbable that a youth of sixteen (rec., pp. 347, 350) in his circumstances would be likely to conceive, much less to carry out, the idea of making a family tree of the Baca family. It is improbable that such a youth having been told by his father all about the family (rec., p. 347) would think it necessary to apply to his great uncles Prudencio, Manuel and Domingo to give him further information. It is improbable that his father or either of his great uncles would have made declarations within two years after executing the deed of May 30, 1871, in which they solemnly covenanted that the grantors were all the heirs of Luis Maria Baca, that there was another heir. It is improbable that Marcos, who knew of the will, the petition of the executor and the order of reference, did not know what the result of the hearing before the Alcalde was (rec., p. 377), and

would not have testified what it was if it had been favorable. It is improbable that Marcos, who, according to his testimony was for twenty years working on this subject and knew of the partition suits and procured information as to the heirs for use in them, did not examine the records in those suits or know what the outcome was in regard to whether or not Antonio was found to have been an heir (rec., p. 377). It is improbable that Marcos, himself a lawyer, did not inform his relatives of their rights. It was only when Wise came to him with actual money in his hands that he talked about the "reputed" heirs of Antonio.

It is not to be believed that the witness' father, who had acted as agent since 1869 for the heirs, who was himself a grandson of Luis Maria Baca, who employed John S. Watts and furnished him the information as to the heirs of Luis Maria Baca on which Watts acted, should not have caused Antonio or his heirs to be included in the list of heirs in either of the petitions presented to the surveyor general; or that the witness' father, or his great uncles would have joined in the deeds of May 1, 1864, and May 30, 1871, which purported to convey all the interest of the heirs, not in one but in several of the grants, and not have observed and corrected the omission of Antonio's interest, if he had any, especially when in the latter deed their attention was expressly directed to it by the covenant that the grantors were the sole lawful heirs of Luis Maria Baca.

The witness' willingness to testify as of his own knowledge to matters which he could not have known of his own knowledge and which he was forced to admit he only knew from hearsay, and the failure to produce a single one of the alleged heirs of Antonio who made the deeds to Marcos to corroborate him to the slight extent of showing who their fathers and mothers were, added to the other defects, renders his testimony unbelievable and makes it such that under the decisions referred to the alleged declarations are of no value.

There is no competent evidence at all that the persons who executed the deeds to Marcos C. de Baca were the lawful descendants of the alleged Antonio and entitled to inherit from him, no evidence of the marriage of parents or birth of children in lawful wedlock.

The case was closed on April 1, 1915, and the Court caused a minute to be made of that fact and that the defendants below, Wisés, were allowed twenty days within which to file a brief as to Antonio and the other parties twenty days thereafter to reply, the matter that is as to Antonio, being taken under advisement (rec., p. 433).

Thereafter and after the forty days had expired and on August 12, 1915, the attorney for the defendants below, Wisés, filed in the clerk's office at Tucson, and gave notice of, a motion to reopen the case to admit certain certified copies of depositions filed in one of the partition suits in New Mexico.

This motion was properly denied for two reasons: *First* the attorney had an uncertified copy of these papers at the hearing and had permission to file them and procure certified copies later but did not avail himself of such permission (rec., p.) and *second* such certified copies were inadmissible (*Rollins v. Wicker*, 70 S. E., 934; 154 N. C., 559, 562), where the Court said

“the testimony of such persons (referring to declarants) given in a former trial involving the same questions as in the present case is incompetent.”

Later the defendants below, Wisés, sought to introduce the certified copies of the depositions above referred to and, on objection, permission was refused. For the reasons above stated this was a correct ruling.

Another reason why the certified copies of depositions should not have been allowed to be introduced after the hearing was that it meant a reopening of the whole case as the other parties would necessarily have had to rebut by offering other portions of the record in the partition suits or otherwise.

When the Deeds to Marcos C. de Baca From the Alleged Heirs of Antonio and the Deeds to the Defendants Below Joseph E. Wise and Margaret W. Wise Were Offered in Evidence They Were seasonably objected to.

This objection should have been sustained for the reasons given in this brief why such deeds were incompetent, irrelevant and immaterial, and because it did not appear that the grantors in the deeds to Marcos C. de Baca had any title to convey.

Summary.

It is confidently submitted that there is an entire failure on the part of the defendants below, Joseph E. Wise and Margaret W. Wise, to sustain the burden of proof which was on them to establish that there was an heir of Luis Maria Baca, named Antonio, *entitled to inherit*, or that the persons who conveyed to Marcos C. de Baca were the lawful descendants of such Antonio and entitled to inherit from him.

More than this there is no competent evidence to prove that there was an heir named Antonio or that he left lawful descendants entitled to inherit.

There is in the omission from the several petitions presented to the surveyor general of any reference to the heirship of Antonio or his descendants and in the similar omission in the two deeds to Watts, in one of which the grantors, brothers and sisters and other near relatives of the alleged Antonio, covenant

that the grantors are the sole lawful heirs of Luis Maria Baca, taken in connection with the allegations in the petition of the executor that the deceased son—said to be the alleged Antonio—was not an heir entitled to inherit on account of having been advanced his share of the estate, very strong, suggestive and persuasive evidence that there was no heir, named Antonio, entitled to inherit.

Certainly the overwhelming weight of the evidence is against the claim, so that the judgment of the court below as to Antonio was at least against the weight of the evidence.

II.

The title involved in this suit is derived under the Act of Congress of June 21, 1860, and in the grant under the Sixth Section of that Act neither Antonio nor his heirs could have had any interest.

The grant made by the sixth section of the Act of June 21, 1860, was in exchange for the rights of the claimant heirs of Luis Maria Baca to the Las Vegas grant.

Congress had full power under the Treaty under which the territory of which this land formed a part was acquired from Mexico, to prescribe the mode of ascertaining the validity of claims of title under Spanish and Mexican grants, and in case such mode was not complied with, to provide for the forfeiture of such claims.

- Barker v. Harvey*, 181 U. S., 481, 486, 487 ;
Ainsa v. United States, 161 U. S., 208, 222 ;
Astiazaran v. Mining Co., 148 U. S., 80 ;
Botiller v. Dominguez, 130 U. S., 238 ;
Tameling v. U. S. Freehold Co., 93 U. S., 644, 661,
 662 ;
U. S. v. Repentigny, 72 U. S., 217, 268.

Congress exercised this power and performed this duty by the passage of the Act of July 22, 1854 (10 Stat., 308, 309), in regard to lands in New Mexico by providing among other things :

“ SEC. 8. And Be It Further Enacted, that it shall be the duty of the Surveyor General under such instructions as may be given by the Secretary of the Interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico ; and for this purpose may issue notices, summon witnesses, administer oaths and perform all other necessary acts in the premises. He shall make a full report of all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo Eighteen hundred and forty-eight, defining the various kinds of title with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States ; and shall also make a report in regard to all the pueblos existing in the territory showing the extent and locality of each, stating the number of inhabitants of said pueblos respectively and the nature of their title to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior ; which report shall be laid before Congress for such action thereon as may be deemed just and proper with a view to the confirmation of *bona fide* grants and to give full effect to the Treaty of Eighteen hundred and forty-eight between the United States and Mexico ; and until final action by Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government and shall not be subject to donations pursuant to the provisions of this Act.”

“ SEC. 9. And Be It Further Enacted That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for the full carrying into effect of the several provisions of this Act.”

Pursuant to the provisions of the foregoing Act the Secretary of the Interior issued regulations on August 25, 1854 (Public Domain, 394-398) which read in part as follows :

“ Your first session will be held at Santa Fe. * * * You will commence your session by giving proper public notice of the same, in a newspaper of the largest circulation, in the English and Spanish languages, will make known your readiness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require the claimant in every case—and give public notice to that effect—to file a written notice setting forth the *name of the present claimant* ; name of the original claimant ; nature of the claim, whether inchoate or perfect ; its date ; from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted ; quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claims, and to show a *transfer of right from the original grantee to the present claimant.*”

Due notice by advertisement was given, requiring claimants to present their claims stating the source and chain of their title, etc. (Public Domain, p. 404). In accordance with such notice certain persons appeared as claimants for the Las Vegas grant.

Pursuant to the regulations and in accordance with the provisions of the Act the Surveyor General under date of December 18, 1858, made a report as to the Las Vegas grant, accompanied by the documents upon which such report was based (36th Cong., 1st Sess. H. R. Ex. Doc. No. 14, Claim No. 20).

The petition in that proceeding (Santa Cruz Development Co., Ex. 1, rec., p. 403) was filed by John S. Watts as attorney

for the petitioners, who are stated to be "the surviving heirs at law of one Luis Cabeza de Baca, deceased," and whose names are set out in detail, neither Antonio Baca nor his descendants.

In support of the petition certain testimony was taken before the Surveyor General (Santa Cruz Development Co., Ex. 2, rec., p. 405), by which it appears that the witnesses knew the sons and grandchildren of Luis Cabeza de Baca, and that those named in the petition were all of the surviving heirs of Baca.

In accordance with the provisions of the Act of July 22, 1854 (*supra*), the report of the Surveyor General, to which reference was made as above stated, found that the grant to Luis Maria Baca was valid and prior to a grant of the same land to the town of Las Vegas, which he also found valid.

The Senate Committee on Private Land Claims on May 19, 1860 (Rep. Com. No. 228, Sen. 36th Cong. 1st Sess.), reported that the grant to Baca "was in fee and is a genuine and valid title;" that the heirs of Baca had expressed a willingness to waive their older title in favor of the settlers under the grant to the town of Las Vegas and recommended that Congress so legislate as to accomplish that purpose.

In pursuance of this recommendation Congress, by an Act entitled "An Act to Confirm Certain Private Land Claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 71, 72), enacted among other things :

"SEC. 3. And Be It Further Enacted that the private land claims in the Territory of New Mexico as recommended for confirmation by the said Surveyor General in his reports and abstracts marked 'Exhibit A' as communicated to Congress by the Secretary of the Interior in his letter dated 3d of February, 1862, and numbered from 20 to 38 both inclusive, be and the same are hereby confirmed with the exception of the claim numbered 26 in the name of Juan Vigil, No. 26, which claim is not confirmed.

SEC. 6. And Be it Further Enacted that it shall be

lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the Town of Las Begas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them; *provided, however*, that the right hereby granted to the said heirs of Baca shall continue in force during three years from the passage of this Act and no longer."

The Act was approved June 21, 1860, so that there is no question about the time of passage.

The question presented on this appeal, is whether under the foregoing facts—assuming that there was such a person as Antonio Baca—that he was the son of Luis Maria Baca; that he died before his father; that he left a son—Juan Manuel—who was heir to his interests in the original Las Vegas grant to Luis Maria Baca, did either Antonio Baca or his said son Juan Manuel have any interest in the lands selected and located under the Sixth Section of the Act of Congress of June 21, 1860, which are the lands in question here?

It is settled law that in considering this question all of the proceedings, commencing with the presentation of the petition to the Surveyor General and ending with the Act of Congress, must be considered as one act.

Landis v. Brant, 10 How. (U. S.), 348, 372.

Jones, Rec'r. v. St. Louis Land & Cattle Co., 232 U. S., 355,

in which last case the Court said (pp. 360, 361) :

“ The proceedings therefore for the confirmation of titles derived from Mexico commenced with the Surveyor General and were consummated by the confirming

Act. * * * the petition to him as the commencement of the proceedings which necessarily involved the validity of the grant from the Mexican government. Congress, however, constituted itself the tribunal for the ultimate decision of the validity or invalidity of the claim, as of course it might do in discharge of the treaty obligations * * *. The confirmation therefore can not be disassociated from what preceded it."

As has been shown, Congress by the third section of the Act of June 21, 1860, confirmed claim No. 20, which included both the claim of the heirs of Baca and of the town of Las Vegas.

In *Maese v. Herman*, 183 U. S., 581, the Supreme Court held that, in view of the waiver of their prior right by the heirs of Baca, who presented their claim to the Las Vegas grant to the Surveyor General, the third section of the Act confirmed the grant to the town of Las Vegas not to the heirs of Baca in view of the sixth section, saying :

" Congress accommodated the dispute (to the title to said land) by a magnificent donation of land to the heirs of Baca and confirmed the original grant to the town."

The grant by the sixth section of the Act of June 21, 1860, was therefore a grant *de novo* by Congress of a part of the public domain to the heirs of Baca " who make claim to the said tract of land as is claimed by the town of Las Vegas."

The power of Congress to make a direct grant of public lands, and that in such case the grant is as effective as if by patent or by deed, is too well established to require the citation of authorities. Here the only difference between this and the ordinary direct grant was that the grant was on condition that the land should be selected within three years, which condition was complied with with regard to the land here in question.

In *Tameling v. U. S. Freehold Co.*, 93 U. S., 644, it was held that the action of Congress confirming a private land claim in New Mexico "as recommended for confirmation by the Surveyor General" of that territory, was not subject to judicial review; nor is the action of Congress in making grants of public land the subject of judicial review, though it may be necessary for the Courts, as here, to decide to whom the grant is made.

The words "claim" and "claimant" used in regard to grants of land made by foreign governments in territory subsequently ceded to the United States, which required recognition and confirmation by that government, have obtained a fixed interpretation by the decisions of the courts of the United States, and by them it has been decided uniformly that in such cases the confirmation was made to the person claiming the grant before the constituted tribunal, and, in every event, the title, if confirmed, inured to him in his character of claimant.

The question, as the Supreme Court says in *Connoyer v. Shaeffer*, 22 Wall., 260, "Has been settled so long that it has become a rule of property, and it would produce infinite mischief to disturb it." The language of the Supreme Court as to whom the confirmation of the claim inured is decisive, the court saying in *Bissel v. Penrose*, 8 How., 317, 338:

"This is the view taken of the question in *Strother v. Lucas*, on each occasion where it was before this court (6 Pet., 772; 12 Pet., 458). It was there held that the confirmation was to be deemed in favor of the person claiming it."

This question again came before the Supreme Court in *Connoyer v. Shaeffer*, 22 Wall., 254, and as this case is finally decisive, and, in our opinion, determinative in this case, the opinion of the Court is given *in extenso*.

This case was one arising under proceedings before the

board of Commissioners appointed under the Act of March 2, 1805, for ascertaining and adjusting claims to lands embraced in the Louisiana purchase, and Mr. Justice DAVIS, on page 260, says :

“ The substantial point of inquiry presented in this case is, to whom did the confirmation inure ?

“ The question which we are called upon to consider is not a new one. If it were it would certainly not be free from difficulty. It has, however, been settled so long that it has become a rule of property, and it would produce infinite mischief to disturb it. Two classes of claims were presented to the Commissioners—one where the claimant exhibited with his claim evidence of a derivative title from the concedee, the other where he only produced the original concession without attempting to show his connection with it.

“ In the latter class the claim, if confirmed, has been held to have the effect of a confirmation to the legal representatives of the person to whom the original concession was made. This ruling proceeds upon the theory that the Commissioners passed upon nothing but the merits of the original concession, having no opportunity to pass upon the validity of anything else. Of this class, where no evidence of derivative title at all was filed with the concession is the case of *Hogan v. Page*, 2 Wall., 605. But when the claimant presented before the board, besides the original title, evidence of derivative title, it has been held that the Commissioners decided upon both, and that the confirmation operated as a grant to the claimant, *although his name was omitted in the form of confirmation*. This was expressly ruled in *Bissel v. Penrose*, 8 How., 317. The claim there was confirmed to Benito, Antoine, Hypolite, Joseph, and Pierre Vaquez, or their legal representatives, according to the concession. Rudolph Tillier presented the claim for confirmation and produced the concession, with written evidence of his title, which would appear to have been imperfect. It was argued there, as here, that the act of 1836 confirms only the

Spanish concession in the abstract, but the court held otherwise, and decided that the title was confirmed to Tillier, the assignee, as claimant" (italics ours).

The Court continues on page 262 :

" The same point was again presented to the Supreme Court of Missouri in Carpenter v. Rannells, 45 Mo., 584, with the same result.

" The record, in that case shows that James Bankson, as assignee of John Butler, under an executory contract, claimed the land, and produced to the board evidence upon which a confirmation was granted. The judgment of confirmation, however, was to John Butler, or his legal representatives, but the Court held, on the authority of Bissel v. Penrose and Boone v. Moore, 14 Mo., 420, that the legal effect of this confirmation was to vest the title in Bankson. The principles in this case are examined and adhered to in the case of the present plaintiffs against Labeaume's heirs, reported in 45 Mo., 139.

" The case of Carpenter v. Rannells was brought to this Court (19 Wall., 138), and it was held substantially, that Bankson, having presented the claim and filed his paper title with it, the confirmation inured to him, and that *no other representative of Butler, whether hereditary or by contract, had any right, legal or equitable, to the premises in controversy*" (italics ours).

(p. 263) :

" After the lapse of more than sixty years Labeaume's title is disputed in behalf of persons who never appeared before the Commissioners with any claim of their own."

In the Los Trigos grant, confirmed as claim No. 8 by the Act of June 21, 1860, the surveyor general in his opinion says (36 Cong., 1st Sess., H. R. Report No. 321, p. 154) :

" The instructions to this office provide that when a claim may be presented by a party as ' present

claimant', in right of another, and where the deraignment of title is not complete, the entry and decision should be in favor of the legal representatives of the original grantee. * * * The grant is, therefore, confirmed to the legal representatives of Francisco Trujillo, Diego Padilla and Bartolome Marquez."

In the Preston Beck grant, confirmed by the Act of June 21, 1860 (12 Stat., 71), as claim No. 1, the Supreme Court, speaking of the surveyor general's report, said in *Stoneroad v. Stoneroad*, 158 U. S., at page 247 :

"In his recommendation to Congress, however, which is practically the decretal part of his opinion, he says : 'The Congress of the United States is respectfully recommended to cause a patent to be issued to the said Preston Beck, Jr., by the proper department, and cause the same to be surveyed.' It was this recommendation which was acted upon by Congress."

The language of the confirmatory act is :

"That the private land claims in the Territory of New Mexico as recommended for confirmation by the surveyor general of that territory and in his letter to the commissioner of the general land office of the 12th of January eighteen hundred and fifty-eight designated as numbers one, * * * be and the same hereby are confirmed."

In the Sangre de Christo grant, confirmed by Congress by the Act of June 21, 1860, as claim No. 4, the surveyor general in his report says (36 Cong. 1st Sess., H. R. Rep., No. 321, on page 14) :

"Narciso Beaubien, one of the grantees, was killed at the massacre of Taos in the year 1847, and, dying without issue, his father, Charles Beaubien, the present claimant, became the heir of one undivided half of the land granted, and purchased the remaining undivided

half from Joseph Pley, administrator of the estate of Stephen L. Lee, who was killed at the same time and place as Narcisco Beaubien."

He further states :

" It is the opinion of this office that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition—the grant is therefore approved by this office," &c.

In the Bracito grant, confirmed by the Act of June 21, 1860, as claim No. 6, the surveyor general, says (36 Cong., 1st Sess., H. R. Report No. 321, on page 34) :

" The testimony also shows that a grant was made to Juan Antonio Garcia in the year 1822 or 1823."
* * *

" The claimants have not presented any testimony to prove that the present claimants are the legal heirs and assignees of Juan Antonio Garcia, deceased, * * * and as no claim of title is presented to show that the present claimants are the legal heirs and assigns of said Juan Antonio Garcia, it is the opinion of this office that the grant should be confirmed to Juan Antonio Garcia alone."

In the Los Esteros grant, confirmed by the Act of June 21, 1860, as No. 16 (same Pub. Doc., p. 268), the surveyor general, on page 268, after stating the grant to Pedro José Perea, says :

" On the 15th day of December, 1856, Pedro José Perea executed a deed of gift of the aforementioned land to José Leandro Perea, his son, the present claimant. * * * The grant is therefore confirmed to José Leandro Perea, and transmitted to the proper department for the action of Congress in the premises."

In the Caspar Ortiz claim, confirmed by the Act of June 21, 1860, as claim No. 31 (36th Cong., 1st Sess., H. R. Ex. Doc. No. 14), the surveyor general, on page 179, makes the following report :

“ Gaspar Ortiz claims a title to a tract of land by virtue of an agreement made by Gaspar Domingo de Mendoza on the 25th September, 1789, to Vicente Duran de Armijo, and possession given by him on the fifth of October of the same year by Juan Garcia de Mora, senior justice and war captain of the town of Santa Cruz. It has been proven in evidence by the present claimant that his grandfather Gaspar Ortiz, purchased the land claimed from Vicente Duran de Amijo, and that himself and his heirs have occupied the land continuously from the year 1789 up to the present time, and that the land was duly conveyed by an instrument in writing to the said Gaspar Ortiz, senior, and that the document has been lost or mislaid in such a manner as to prevent its being produced. The land has been quietly and peaceably held by the claimant and his ancestors, and is believed to be a good and valid grant; but as the chain of title is from the original grantee to the present claimant, the claim being inchoate, it is approved to the legal representatives of Vicente Duran de Armijo, and ordered to be transmitted to Congress for its action in the premises.”

In the Valverde grant, confirmed by the Act of June 21, 1860, as claim No. 33 (same Pub. Doc.) it appears that the claimants were Manuel Armendaris, Henrique Armendaris, Miguel Armendaris, Antonio Armendaris and Rodrigo Garcia, father and guardian of the infant children of Beline Armendaris, deceased, being the only surviving heirs and legal representatives of the said Pedro Armendaris, deceased. On page 220 the surveyor general reports :

“ The above grant was made according to the well-established usages and customs of the country at the

time. The grantee has held possession from the time grant was made up to the present day, and no one having appeared to show a better title thereto, the original and subsequent additional grant are believed to be good and valid; they are therefore approved to the legal representatives of Pedro Armendaris, and ordered," &c.

In the claim of Ramon Vigil, confirmed by the Act of June 21, 1860, as claim No. 38, a petition for confirmation was filed by Ramon Vigil, as claimant (Same Pub. Doc., p. 249). The surveyor general, on page 253, made the following report:

" Pedro Sanchez, a resident of Santa Cruz de la Canada, made application to Don Gaspar Domingo de Mendoza for a tract of land in what is now the county of Rio Arriba and contained within the boundaries therein mentioned. On the 20th day of March, 1742, Governor Mendoza granted him the land asked for, and ordered the chief justice of the jurisdiction of Canada to place him in possession, which was done on the 28th day of the same month.

" The claimant, although he referred to other documents in his petition, has never filed them, and consequently can show no transfer of title from the original grantee to himself.

" The grant above referred to, and acted upon by this office, is the original filed by the claimant, and is believed to be genuine.

" The case has been advertised. The parties are and have been in quiet and peaceable possession of the land from time immemorial. It is therefore deemed to be a good and valid one, and is approved to the legal representatives of Pedro Sanchez."

From the above instances which have been given of the mode of procedure by the surveyor general regarding claims to land presented to him for adjudication and confirmation in the first instance, the results of which procedure were to be

by him transmitted to Congress for its final action on his reports on such claims, which, if confirmed, were so confirmed "as recommended for confirmation by the surveyor general," it is obvious, that that official had, under the act of 1854, and the regulations issued thereunder by the Land Office, and the legislative construction given to that Act and those regulations by the confirmatory Act of June 21, 1860, and the judicial construction in the case of *Tameling v. U. S. Freehold Co.*, *supra*, the authority to report not only on the validity of the original grant, but to decide who was the claimant to whom the grant was to be confirmed by Congress, and to whom a patent was to be issued. His decisions on these matters, if confirmed by Congress, were final, and not subject to review by the Courts.

As the Supreme Court says in *Tameling v. U. S. Freehold Co.*, 93 U. S., 662:

"It is obviously not the duty of this Court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant."

If the claim of title of the Baca heirs to the grant of Las Vegas Grandes had been recommended for confirmation by the surveyor general, and had been confirmed by Congress, then, under the provisions of the Act of 1854, and the regulations issued thereunder, the procedure of the surveyor general as shown in the foregoing instances, and the above cited decisions of the Supreme Court, that confirmation must have been to the heirs of Luis Maria Baca who made claim before the surveyor general, or, in the event the judgment of confirmation had been to Luis Maria Baca or his legal representatives the title must have inured to those heirs who made claim. The making claim was an essential and determinative fact in the proceedings.

The procedure of the surveyor general under the Act of

1854, and the regulations issued thereunder by the Land Office, was in harmony with the decisions of the Supreme Court hereinbefore cited. Where a claim was presented to him by a claimant other than the original grantee or his legal representatives who produced the papers of original grant and those of transfer to himself; or where, as in this case, certain of the heirs of the original grantee produced the original grant papers and the proof of their exclusive derivative title as the sole male heirs of the grantee, the confirmation was to the claimant or claimants, otherwise it was to the legal representatives of the original grantee. The surveyor general passed not only upon the validity of the grant but the title of the claimant, and if the grant was confirmed by Congress, "as recommended for confirmation by the surveyor general," as was done in this case, such action was not subject to review by the courts (*Tameling v. U. S. Freehold Co., supra*).

The whole purpose of Congress in enacting the Act of July 22, 1854, to provide a mode in which titles in New Mexico under alleged Spanish or Mexican Grants might be settled would be defeated if when certain persons representing themselves to be the sole surviving heirs of a grantee had applied to the surveyor general and by him been found to be entitled to the grant; and Congress acting upon his finding had not confirmed the original grant but accepting waiver of the original grant from the claimant heirs had made a grant *de novo* to them and they had disposed of the land to *bona fide* purchasers for value without notice, other heirs of the original grantee could claim an interest in the grant made by Congress in lieu of the original grant.

In other words, when Congress passed the sixth section of the Act of June 21, 1860, it is evident from the language that they had in mind the persons who had presented their claim to the surveyor general and who he had found to be the holders of a superior grant to the town of Las Vegas.

Certainly no claim can be made that in making the selection and location of June 17, 1863, John S. Watts acted for or had any authority to act for the alleged Antonio Baca or his descendants.

As has been above stated in determining to whom the grant was made by the sixth section of the Act of June 21, 1860, all of the proceedings commencing with the petition to the surveyor general and ending with the act of confirmation must be considered.

Further than this the attention of the Court is called to the fact that the sixth section of the Act of June 21, 1860, in its present form was inserted in the Senate on the report of a Committee of which Senator Judah P. Benjamin was Chairman. Mr. Benjamin was a lawyer of international reputation and naturally was fully aware of the legal difficulties attending a grant to the heirs of a deceased person in such a case, and it is fair to assume that by the limitation to the heirs "who make claim to the same land as is claimed by the town of Las Vegas" he meant to relieve the Land Department of the difficult task of determining who were the heirs and to make the grant to specific persons, since *id certum est quid certum reddi potest*.

III.

The representatives of Antonio Baca can not in this case or in this manner have their claim adjudicated. The most they can claim, if Antonio had any interest in the Las Vegas grant, would be against the other heirs of Baca for a portion of the proceeds of sale received by such other heirs.

If a patent issues to the wrong person, the only remedy of the rightful claimant is a suit in equity against the original patentee to impress a trust on the land if unsold or to reach the proceeds if the land has been sold.

Marquis v. Frisbie, 101 U. S., 473, 475.

Johnson v. Tousley, 13 Wall., 72.

Shepley v. Cowan, 91 U. S., 330.

So here if Antonio had any interest in the Las Vegas grant the only remedy of his descendants is against the other heirs of Luis Maria Baca.

IV.

Neither Antonio nor his heirs had any interest in the Las Vegas grant.

This case does not involve the Las Vegas Grant, nor is it affected in any way by that grant. The question in this case relates solely to the grant by Congress of a portion of the public domain by the sixth section of the Act of June 21, 1860. The only part the Las Vegas grant plays in it is that

Congress, in consideration of the surrender of whatever rights the claimant heirs of Luis Maria Baca had to the Las Vegas grant, granted them the right to locate an equal quantity of vacant land not mineral in New Mexico.

But even if it was a question of the Las Vegas grant neither Antonio nor his heirs would have had any interest in it.

In *Rio Arriba Co. v. United States*, 167 U. S., 298, with regard to a similar grant to that of Las Vegas in New Mexico, the Court said (p. 307) :

“Reference is indeed made to the use of the lands within the outboundaries for pastures and watering places but this does not put them out of the class of public lands, and, whatever equities might exist, no title was conveyed.”

And (p. 308) :

“We have just held in *United States v. Sandoval*, ante, 278, that as to all the unallotted lands within the exterior boundaries as in this instance title remained in the government for such disposition as it might see proper to make.”

See, also, *United States v. Santa Fe*, 165 U. S., 175.

There is no evidence that any portion of the Las Vegas grant was ever set apart to Antonio or any one as representing him ; and under the foregoing decisions, therefore, so far as Antonio was concerned, the whole of the grant remained public domain.

V.

For the foregoing reasons it is respectfully submitted that the decree of the Court below should be reversed so far as it recognizes the title of Joseph E. Wise and Margaret W. Wise to an undivided one-thirty-eighth interest each in said land.

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IN THE
United States Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

SANTA CRUZ DEVELOPMENT
COMPANY,

Appellant,

In Equity.

v.

CORNELIUS C. WATTS *et al.,*

Respondents.

No. 2719.

**SUPPLEMENTAL BRIEF OF MR. VROOM
FOR THE APPELLANT.**

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Appellant,

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Respondents.

In Equity
No. 2719.

**SUPPLEMENTAL BRIEF OF MR. VROOM ON BE-
HALF OF THE APPELLANT.**

Statement of the Case.

This is an appeal by the Santa Cruz Development Company, one of the defendants below, from the whole decree of the United States District Court of Arizona in a suit brought by Messrs. Watts and Davis, as complainants, to reform a certain deed, dated January 8, 1870, which was alleged to have conveyed to their predecessor in title, one Christopher E. Hawley, the tract of land here in litigation, Baca grant No. 3.

From the decree of the court below it might be inferred, that the bill of complaint filed in this case was one to con-

strue a deed so as to create a legal title in the complainants to the tract of land in dispute, and to quiet the title thus created; but by the allegations of the bill, on which recovery must be had, if at all, it was one to reform a deed on the ground of mutual mistake of the parties to it; and the better practice will be found to be to decide the case on matters alleged in the bill that are within the jurisdiction of a court of equity, rather than those that simply embody the desires and expectations of the complainants.

The title to the tract of land here in litigation rests upon the sixth section of the Act of Congress of June 21, 1860 (12 Stat. 71) by which Congress granted to the heirs of Luis Maria Baca the power to select and locate, in lieu of the grant of Las Vegas Grandes, which had been made to them by the Republic of Mexico, an equal quantity of land, to be located in not more than five tracts, in a square form, on vacant and non-mineral lands within the Territory of New Mexico, within three years from the approval of the said statute. The area of the grant of Las Vegas Grandes was found on survey to contain 496,446.96 acres, so that the area of each of the five locations to be made by the said heirs of Baca was 99.289 acres.

On June 17, 1863, the heirs of Baca selected and located the tract of land, designated as Location No. 3, the grant here in controversy, on lands now lying within the County of Santa Cruz, in the State of Arizona, particularly described as follows:

“Commencing at a point one mile and a half from the base of the Salero Mountain in direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles thirty-six chains and forty-four links; thence east twelve miles thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and forty-four links to the point of beginning.”

which said selection and location was, on April 9, 1864, approved by the Commissioner of the General Land Office, and ordered to be surveyed.

On May 1, 1864, the said heirs of Baca conveyed this tract of land to John S. Watts.

The land not having been surveyed, the said Watts, on April 30, 1866, made application to said Commissioner to amend the said location of June 17, 1863, alleging that a mistake was made in the initial point of that location, and asked that the surveyor general be authorized on the survey to change the initial point so as to "commence at a point three miles west by south from the building known as the Hacienda de Santa Rita" giving a description by metes and bounds of the amended location.

On May 21, 1866, the said Commissioner approved the amended location, and returning to the surveyor general the original instructions for survey of April 9, 1864, he instructed him to "cause the survey to be executed in accordance with the amended description of the beginning point, which is described in Mr. Watts' application of April 30 last, provided by so doing the out-boundaries of the grant thus surveyed will embrace vacant land not mineral."

The amended location not having been surveyed, the said Watts, on January 8, 1870, in consideration of one dollar, remised, released, and quit claimed to Christopher E. Hawley,

"All that certain tract, piece or parcel of land situate, lying, and being in the Santa Rita Mountains, in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Baca by the United States, and by the said heirs conveyed to the party of the first part by deed dated May 1, 1864, bounded," &c.

Giving by metes and bounds the description of the amended location of April 30, 1866.

“the said tract of land being known as location No. 3 of the Baca series.”

The respondents, Mess. Watts and Davis, the successors to title to said Hawley, allege in their bill of complaint, that there was a mistake of law by the Government, by Watts and by Hawley, as to the legal effect of the amended location of April 30, 1866; and that by the deed of January 8, 1870, the interest in land that Watts intended to convey, and did convey to Hawley was Baca grant No. 3, as located on June 17, 1863, and not as amended on April 30, 1866, and they prayed that the said deed of January 8, 1870, be decreed to convey to said Hawley the original location of June 17, 1863, of Baca grant No. 3; and that all the defendants be forever foreclosed from making any claim to the said land or any portion thereof.

On September 30, 1884, the heirs of said John S. Watts and one David W. Bouldin executed an instrument in writing by which the said heirs “granted, bargained, and sold” to said Bouldin Baca grants Nos. 2, 3, and 4. No evidence was adduced on the hearing below to prove that the said heirs had any title to the grants Nos. 2 and 4, and with regard to Baca grant No. 3, which was described by the metes and bounds of the original location of June 17, 1863, the instrument recited:

“Also location No. 3, which was located under and by virtue of the aforesaid 6th section of an act of Congress passed June 21, 1860. Said location was heretofore duly surveyed in accordance with the provisions of said act, and the field notes returned to the proper office, but the surveyor general disapproved of the same as being located on mineral lands.”

The consideration moving from the said Bouldin was, that as speedily as possible, at his own cost, he would cause

the alleged imperfect title to the said Baca grant No. 3, to be perfected by the United States, or other land or land certificates to be granted in lieu of it by the Government; and, in either event, the said Bouldin was to have a two-third, and the Watts heirs a one-third interest in such perfected location, or other land or land certificates granted in lieu thereof.

The defendants, the legal representatives of said David W. Bouldin pleaded in their answer and cross bill, that the said instrument of September 30, 1884, was a deed, and conveyed to the said Bouldin, his heirs and assigns, a fee simple title to two-thirds of Baca grant No. 3, as located on June 17, 1863; and that by reason of deeds of partition executed by and between said Robinson and certain heirs of said Bouldin they were the owners of the north half of said grant, and prayed that it might be confirmed to them.

The defendant Joseph E. Wise pleaded in his answer and cross bill, that the title to the said tract of land so as aforesaid alleged to have been conveyed to the said Bouldin vested in him by sundry deeds and proceedings at law, and he prayed that the said title be confirmed to him. The said Wise and Margaret W. Wise also claimed that each was entitled to an undivided $\frac{1}{38}$ of the said grant by reason of certain deeds from the heirs and legal representatives of one Antonio Baca, an alleged son and heir of Luis Maria Baca.

POINTS OF ARGUMENT.

I. The sixth section of the statute of June 21, 1860, and the action of the commissioner of the General Land Office of April 9, 1864, in pursuance thereof, in approving the selection and location of Baca grant No. 3 by the heirs of Luis Maria Baca made on June 17, 1863, and in ordering its survey, vested in the said heirs an indefeasible, legal title to the tract of land so by them selected and located.

II. The deed of January 8, 1870, by John S. Watts to Christopher E. Hawley conveyed specifically by metes and bounds the attempted amended location of April 30, 1866, to Baca grant No. 3. It did not convey specifically by metes and bounds the original location of June 17, 1863; therefore it must have conveyed either a conditional or equitable title to said grant, or it conveyed nothing.

III. If the bill was filed to reform the deed of January 8, 1870, under which the respondents, Watts and Davis, claim title, because of mistake, it cannot be maintained, no proof having been offered by the said respondents on the hearing to sustain the allegations of their bill, and, on that ground, the bill should have been dismissed.

IV. If the bill was filed to have the court, sitting in equity, construe said deed of January 8, 1870, the court had no jurisdiction to do so, except as incidental to the administration of equitable relief, and as none was alleged in the bill excepting the reformation of said deed because of mistake, the bill should have been dismissed for want of jurisdiction.

V. If the bill was filed to quiet the title to the land in dispute, it should have been dismissed for want of jurisdiction, because the complainants did not allege nor prove that they had the legal title to, nor possession of the said land. The court could not in this suit construe the deed conveying an equitable title to the land in controversy so as to create a legal title to it in the complainants, and having done that, in the same suit, quiet the title to the land thus decreed to be a legal title. The bill was, in this respect, multifarious, and should have been dismissed on that ground.

VI. The decree of the District Court being, in effect, by paragraph 6, that the tract of land here in litigation was segregated from the public domain on December 14, 1914; and the complainants having filed their bill on June 25, 1914, the bill should have been dismissed on the ground, that while the fee simple title to, and possession of, said land was in the United States, no suit could be brought by the complainants to establish their legal title to said land.

VII. The only remedy for the complainants on the facts alleged in their bill would be, after December 14, 1914, to file their bill to have the court decree, that the person to whom the patent for Baca grant No. 3 issued or enured on said date, in this case by the decision of the Supreme Court in *Lane vs. Watts*, supra, the appellant, the Santa Cruz Development Company, the legal representatives of the heirs of Luis Maria Baca, the original grantees, held the said land in trust for them.

VIII. The right of the complainants below to demand this relief, under the allegations of their bill, would rest upon an estoppel operated by the so-called bond from John S. Watts to William Wrightson, dated February 2, 1863, in pursuance of which the said deed from the said Watts to said Hawley of January 8, 1870, is alleged to

have been executed. But no estoppel was operated, because the complainants failed to prove on the hearing, that the said bond was assigned to their grantors or to them; or that the said deed of January 8, 1870, was executed in pursuance of said bond; or that by the said bond or by the said deed it was agreed by the said Watts to convey, or that he conveyed to the said Hawley the legal title to the land in dispute—the original location of Baca grant No. 3 of June 17, 1863.

IX. The said deed of January 8, 1870, conveyed to the said Hawley no right, title, or interest to the said original location of June 17, 1863, by reason of the fact that the tract of land—the attempted amended location of 1866—particularly described in said deed, to some slight extent overlaps the original location of June 17, 1863, to which the grantor, Watts, then had the legal title.

X. The instrument of writing executed by and between the heirs of John S. Watts and David W. Bouldin, dated September 30, 1884, under which James E. Bouldin, Jennie N. Bouldin, Joseph E. Wise, Lucia J. Wise, and W. G. Rifenburg, defendants below, claim title to the land in dispute, was not a deed but an executory contract, and being a contract that related solely to property which had no actual or potential existence, it was nudum pactum and void.

XI. The grant from the United States to the heirs of Luis Maria Baca by the sixth section of the act of June 21, 1860, was exclusively to “the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas,” and did not embrace heirs of the said Baca who did not “make claim” to the surveyor general of New Mexico or to the Congress pursuant to the Statute of September 30, 1854, and the regulations made thereunder.

POINT I.

The sixth section of the Statute of June 21, 1860, and the action of the Commissioner of the General Land Office of April 9, 1864, in pursuance thereof, in approving the selection and location of Baca grant No. 3 by the heirs of Luis Maria Baca made on June 17, 1863, and in ordering its survey, vested in the said heirs an indefeasible legal title to the tract of land so selected and located.

The Supreme Court in the case of *Lane v. Watts* (234 U. S., 524) involving the title to Baca grant No. 3, the land here in dispute, said on the motion for a rehearing (235 U. S., 20) :

“The opinion is explicit as to the main element of decision. It decides that the title to the land involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in pursuance of the act of 1860.”

This opinion presents for the consideration and determination of the Court the question, what title to the land granted is to be understood to then have passed to the heirs of Baca under this decision of the Supreme Court of the United States?

The title to this grant rests upon the sixth section of the act of June 21, 1860 (12 Stat. 71), which reads as follows:

“That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number,” * * *

Congress had, by the third section of the said act, confirmed the grant of Las Vegas Grandes to the town of Las Vegas, and, in consideration of the heirs of Baca waiving their older and better title to the land thus confirmed, had granted to the said heirs, by the sixth section, the power in land from which sprang Baca grant No. 3.

The Supreme Court, in the case of *Maese v. Herman*, 183 U. S., 581, held that the third section of the said Act of 1860 confirmed the grant of Las Vegas Grandes to the town of Las Vegas, and not to the heirs of Baca. The language of the Court is:

“Congress accommodated the dispute” (to the title of said grant) “by a magnificent donation of land to the heirs of Baca, and confirmed the original grant to the town.”

Thus the grant to the heirs of Baca was not a confirmation by Congress of the pre-existing Mexican grant of Las Vegas, but a grant *de novo* by Congress of a part of the public domain.

This grant was a present grant, although it is expressed as a power, which the grantees were empowered to exercise at their option. If they, in compliance with the provisions of the act, located an equal quantity of other lands within three years, they became possessed of it, not by some future act of Congress, but by this act.

In creating this power in land, the parties concerned in it were the *donor*, who conferred the power, the *donee*, who executed it, and the *appointee*, or person in whose favor the power was executed. In this case the United States were the donors, the heirs of Baca the donees, and they were also the appointees. Mr. Sugden (*On Powers*, 82) defines a power to be an authority enabling a person to dispose, through the medium of the Statute of Uses, of an interest vested either in himself or in another person. 4 *Kent's Com.*, 316.

The power thus granted was not merely a title, but an actual estate for a term of three years. After the heirs of

Baca had made the selection and location of the land contemplated by the sixth section of the Act of 1860, in other words, after they had executed the power, and the Government had approved that execution, the use in fee simple became and was an actual estate in fee simple by the operation of the Statute of Uses. (2 *Wash. Real Prop.*, Sec. 1653; 4 *Kent's Com.*, 334, 337). These very acts constituted the execution of the power, and the reversion of the United States was thereby defeated.

If this transaction had been one between individuals, the title thus acquired would have carried with it the possession of the land without livery of seizin; but it was one between the United States and the heirs of Baca, and in such case the strict legal title would not pass and possession would not vest, until segregation of the land by survey, and the issuance of a patent or its equivalent, unless the granting statute contained words of present grant (*Schulmberg v. Harriman*, 21 Wall, 44; *Iowa R. R. Co. v. Blumer*, 206 U. S., 491); or was in confirmation of a subsisting grant made in ceded territory by some foreign power. *Stoneroad v. Stoneroad*, 158 U. S. 240.

The Supreme Court says, in *Bagnell v. Broderick*, 13 Pet., 450:

“Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title, until its issue the fee is in the Government; by the patent it passes to the grantee, and he is entitled to recover possession in ejectment.”

Wilcox v. Jackson, 13 Pet. 516.

Langdon v. Sherwood, 124 U. S. 83.

Hussman v. Durham, 165 U. S. 144.

Carter v. Ruddy, 166 U. S. 495.

Michigan Land Co. v. Rust, 168 U. S. 502.

In this case the statute under which the grant was made required that the selections and locations should be approved by the Commissioner and be surveyed by the surveyor general. The instructions of the Commissioner in this regard are set forth at length in *Lane v. Watts*, 41 App. D. C. 130. For the present purpose it is only necessary to state, that the selection and location of Baca grant No. 3, made by the heirs of Baca on June 17, 1863, was approved and ordered to be surveyed by the Commissioner on April 9, 1864. In his communication to the surveyor general of New Mexico the Commissioner says:

“In order to avoid delay you are hereby authorized, whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all expenses incident thereto, to contract with a competent deputy surveyor and have the claim numbered 3 of the series surveyed as described in the enclosed application. *Transcript of the field notes and plats certified in accordance with the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims.*”

From these considerations, we can reach but one conclusion, namely, that when the Supreme Court said in *Lane v. Watts*, *supra*, “that the title to the land involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for in pursuance of the Act of 1860,” the Court must be held to have meant the legal title that arose by the execution of the power granted by the sixth section of the Act of 1860, which alone created it, and which vested *an* indefeasible, legal title in the heirs of Baca, and destroyed the reversion of the United States. The legal title, that is, the strict fee simple title which imports possession (*Green v. Leiter*, 8 Cranch 242) remained in the United States until survey, which survey “will be transmitted to this office and will constitute the muniments of title, the law not requir-

ing the issue of patents on these claims.”—Commissioner’s Order of April 9, 1864.

On May 1, 1864, the heirs of Baca conveyed to John S. Watts, the mediate grantor of the appellant, the Santa Cruz Development Company, Baca grant No. 3.

This grant not having been surveyed in 1866, the said Watts, on April 30th, of that year, applied to the Commissioner of the Land Office, and requested that the original location might be amended, and that on the survey of the grant “the surveyor general of New Mexico be authorized to change the initial point so as to commence at a point three miles west by south of the building known as the Hacienda de Santa Rita, running thence,” etc., giving a description of the proposed amended selection by metes and bounds.

To this application the Commissioner, on May 21, 1866, replied, returning to the surveyor general the original instructions issued on April 9, 1864, for the survey of the location of June 17, 1863, with directions that he “cause the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watt’s application of 30th April last, *provided by so doing the out boundaries of the grant thus surveyed will embrace vacant lands not mineral.*”

On May 21, 1866, when the Commissioner approved and ordered the survey of the amended location of April 30, 1866, John S. Watts had an indefeasible, legal title to the original location of June 17, 1863. Assuming that the Commissioner had the power to authorize the amendment of that location and order its survey, Watts could acquire in such amended location only a conditional interest, dependent on the subsequent survey which was to determine whether “*the out boundaries of the grant thus surveyed will embrace vacant lands not mineral.*” The survey having been made, it must have been approved by the Commissioner to vest a legal title to the land in Watts. The

order itself did not vest in him any present right or title to the land, but only a contingent interest in it—an interest not assignable at law, and one which equity would not enforce until the happening of the contingency.

Story Eq. J. Secs. 1040, 1040b.

Pom. Eq. J. Secs. 1285, 1292.

Watts having thus an indefeasible, legal title to the original location of 1863, and a conditional estate or title in the amended location of 1866, on January 8, 1870, he conveyed to said Hawley the amended location of 1866, particularly describing it by metes and bounds. The conveyance was by a quit claim deed.

The rule of law is, that every man who has a full knowledge of the facts is presumed to understand his legal rights, and this rule is as much respected in courts of equity as it is at law.

Hampton v. Laytin, 18 Wend. 413, and cases cited.

Thus Watts knew that he had a legal title to the original location of 1863; and under this rule of law it must be presumed that he also knew that he had only an equitable or contingent interest in the amended location of 1866. His deed from the heirs of Baca of May 1, 1864, was of record, and notice to Hawley, who also had knowledge of the amended location of 1866 by the deed of 1870 specifically conveying it to him. If that amended location had been surveyed by the surveyor general of Arizona, and subsequently approved by the Commissioner of the General Land Office, that would have vested an indefeasible, legal title to the amended location in Hawley. Would a court of equity, in these circumstances, have listened to Watts asserting, that by his deed of 1870 to Hawley, which specifically described, by metes and bounds, the amended location of 1866, he intended to and did convey the original location of 1863; that the determinative description of the land conveyed was not in the

particular description by metes and bounds, but in the words "Known as Baca Location No. 3."

The Supreme Court well says in *Russell v. Transylvania University*, 1 Wheat. 432:

"If the vendee may set up such a ground of equity the vendor may do the same."

Hawley was not a *bona fide* purchaser without notice of the fact that he was purchasing an equitable or conditional estate. He was a speculative purchaser, and was willing to accept a quit claim deed from Watts, which was equivalent to notice that there were outstanding equities, and that Watts was only willing to place him in the same position he held with reference to the tract of land specifically conveyed.

Hastings v. Niser, 31 Fed. 597.

Johnson v. Williams, 37 Kans. 179.

Sherwood v. Moelle, 37 Fed. 478, S. C. 148 U. S. 29.

POINT II.

The deed of January 8, 1870, by John S. Watts to Christopher E. Hawley, conveyed specifically, by metes and bounds, the attempted amended location of April 30, 1866 to Baca grant No. 3. It did not convey specifically, by metes and bounds, the original location of June 17, 1863, therefore it must have conveyed either an equitable title to the said grant, or nothing.

An indefeasible, legal title to the land granted on April 9, 1864, designated and known as Baca grant No. 3, having passed from the United States and vested in the heirs of Baca, that government could exercise no further control over it, save in survey under the Act of June 21, 1860, and patent.

This was decided by the Land Department and by the Supreme Court of the United States.

On June 15, 1882 (5 L. D. 705) the Secretary of the Interior decided respecting this grant, that :

“It is conceded that a selection was made, the location designated and approved by the surveyor general June 17, 1863, agreeable to the provisions of the act. It appears that this selection was amended upon application made therefore April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that the instruction for the survey of the location as amended was issued by your office May 21, 1866—the claimant must be held to this selection and location, and cannot be allowed to relocate other land in lieu of it.”

Here, from the context, “this selection and location” can only refer to the selection and location of 1863. That tract of land was the only one that had been selected and located, because the location had been approved and ordered surveyed by the Commissioner; while the land embraced in the amended location had been selected and designated, it had not been located, because, by the order of the Commissioner of May 21, 1866, the location of it depended upon a survey which had not been made by the government, and which, under the said order, was to be depended for its legal effect upon the character of the land surveyed.

It would be *reductio ad absurdum* to say, that the Secretary in reversing the decision of the Acting Commissioner, based upon the admitted fact, that the lands of the amended location of 1866 were mineral, and that thus the location was void, decided that the grant claimant must be held to that void amended location. What the Secretary decided was, that the claimant must be held to the location of 1863, and to the amendment to it conditionally allowed by the Commissioner, if, upon survey,

the lands thus selected should prove to be vacant and not mineral. The practical effect of the decision, accepting the statement of Robinson that the land of the amended location was mineral, was to nullify the amended location and to hold the grant claimants to the original location of 1863.

This decision of the Secretary was made in reviewing and reversing that of Acting Commissioner Harrison, who had decided that Baca Float No. 3 could be re-located because, on the showing of the grant claimant, Robinson, *the amended location of 1866* was void, because it had been made on mineral lands, and thus was in contravention to the provisions of the 6th Section of the Granting Act of June 21, 1860. It is significant, that both Robinson and the Acting Commissioner regarded the amended location of 1866 as the legal title to Baca grant No. 3, and not as a mere contingency, as it was—and this is the mistake, one of law, and unilateral, that Hawley, and each and every of his successors in title made respecting it, until the respondents, Messrs. Watts and Davis, as trustees, evolved from their inner consciousness the thought, that the said deed of January 8, 1870, conveyed to their mediate grantor, Hawley, not the amended location of 1866, therein specifically described by metes and bounds, but the original location of 1863, an entirely different tract of land, which was not specifically, or in any other manner, described by the said deed.

Notwithstanding this definitive decision of the Secretary, the various grantors of the respondents, Messrs. Watts and Davis, persisted in asserting their legal title to the attempted amended location of 1866. Robinson, Cameron and finally Alexander F. Matthews, were not only insistent, but vociferous.

On December 21, 1888, Robinson applied to the Commissioner to direct a survey of the lands of Baca Float No. 3, *as amended in 1866*, which application was denied on March 5, 1889 (Record). This decision was affirmed

on appeal by the Secretary in July, and a motion for rehearing was denied.

On June 22, 1892, Robinson and the grantees of D. W. Bouldin, his two sons, agreed to, and did partition, Baca Location No. 3, *as amended in 1866*; and on November 12, 1892, the Bouldins conveyed to Robinson the south one-half, and on November 19 Robinson conveyed to the Bouldins the north half of the said location *as amended in 1866*.

On December 1, 1892, Robinson conveyed to John W. Cameron the south one-half of the said *amended location*, reciting that he derived his title from the partition with the Bouldins.

On June 9, 1893, the said Cameron applied to the surveyor General of Arizona to survey Baca Location No. 3, *as amended in 1866*. In his application he says:

“These floats were numbered 1, 2, 3, 4 and 5, all of them was selected in the same manner as was No. 3, the one under consideration. This was approved by the Surveyor-General of New Mexico on the same day it was selected and located, but the survey was never completed. An amended application was filed, and the Land Office on May 21, 1866, issued instructions for the survey as amended. *It is this location that should be surveyed.*”

The application concludes as follows:

“Now, therefore, in accordance with the Act of Congress, and as one of the owners of this claim, Baca No. 3, and representing all of them, I hereby require of you to make survey of said *amended location*, in accordance with the law and your duties thereunder.”

On August 14, 1893, the said Cameron appealed from the decision of the Surveyor-General of the Commissioner of the Land Office. This appeal does not seem to have been prosecuted.

On September 22, 1893, Alexander F. Matthews acquired by conveyances from said Robinson, said Cameron, Mrs. A. T. Belknap, James Eldridge and Charles E. Eldridge, all of their right, title and interest in the southern half of the *amended location* of Baca Location No. 3, which had been conveyed to said Robinson by deed of partition from the said Bouldins on November 12, 1892.

On or about May 6, 1899, the said Matthews applied to the Commissioner to survey *the amended location of 1866* to the Baca grant No. 3. This application was denied by the Secretary on July 25, 1899 (29 L. D. 44), the Secretary saying:

“It was not simply a ‘mistake in the initial point’ of this selection that was sought to be corrected by the application of 1866, as therein suggested, but a complete change of the selection was thereby asked for, including as well the course of the exterior lines of the claim, as ‘the initial point’ thereof. Under these circumstances to allow the so-called amended selection to stand would be, in reality, to allow a new selection under the grant after the expiration of the time limited for the exercise of the right of selection, and for this there is no authority found in the statute making the grant or elsewhere. The Department is therefore of the opinion that the grant claimants are bound by the selection of June 17, 1863 and that they cannot be allowed to take under the application of April 30, 1866.”

From this decision of the Secretary the said Mathews appealed, asking for a rehearing, stating in his petition, among other things, that from May 21, 1866, when the Commissioner allowed the amended description, to July 25, 1899, when the Secretary decided that such amended description was illegal and void, the Land Department had always recognized and treated the land of the amended description as Baca Location No. 3; that it was con-

sidered by the Government as private land, and as such "passed from grantee to grantee for large considerations"; that "prior to July 25th, 1899, your petitioner sold said property, taking notes for the consideration of the same, secured by mortgage thereon, upon which notes default has been made, largely occasioned by the decisions of July 25, 1899;" that for thirty-three years the Department has never questioned the legality of the allowance of the amended description, it was decided that they were bound by it, and that therefore the Government was estopped from denying such actions in morals, if not in law. The petition concludes with a prayer that the grant claimants be entitled to claim under the amended description of April 30, 1866.

The petition was denied.

The question was finally presented to the Supreme Court of the United States in 1914, and that court decided in *Lane v. Watts*, 234 U. S. 525, and again on a motion for rehearing, 235 U. S. 20, that the legal title to the tract of land, located by the heirs of Baca on June 17, 1863, vested in the said heirs by said location, and its approval by the Land Department and order of survey of April 9, 1864, in pursuance of the Act of June 21, 1860.

In a word, it confirmed the original location of June 17, 1863, under which the appellant, the Santa Cruz Development Company, claims title, and refused to confirm, and thereby rendered void the amended location of April 30, 1866, the title to which was in the grantors of the respondents, Mess. Watts and Davis.

From the above decisions it is evident, that the said Watts by the attempted amended location of April 30, 1866, took no estate, legal or equitable, in the land therein particularly described, and that by his deed to said Hawley of January 8, 1870, he undertook to convey a tract of land to which he not only had no title, but one that had no actual or potential existence. The deed was absolutely void from the day of its date.

To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment.

Story Eq. J., sec. 1040.

Pennock v. Coe., 23 How. 127.

Jones v. Richardson, 51 Mass (10 Metc.) 488.

Howe v. Harrington, 18 N. J. Eq. 495.

Hoak v. Long, 10 Serg. & R. 9.

Peters v. Condron, 2 Serg. & R. 80.

Evans v. Spurgin, 6 Gratt. 107.

The same rule of law applies to grants made by the State.

Polk v. Wendell, 9 Cranch, 87-89.

Wright v. Roseberry, 121 U. S. 520.

POINT III.

If this bill was filed to reform the deed of January 8, 1870, under which the respondents, Watts and Davis, claim title, because of mistake, it cannot be maintained, no proof having been offered by the said respondents on the hearing to sustain the allegations of their bill, and on that ground the bill should have been dismissed.

This deed, on its face, presents no ambiguity. It conveys a tract of land, the amended location of April 30, 1866, specifically described by metes and bounds. If it did not correctly describe the land intended to be conveyed by the parties to it, because of fraud, accident, or mistake, a court of equity would, on a proper showing, grant relief.

The bill of complaint alleges, in paragraph seven, a mutual mistake of law by the parties to the deed, and by paragraph eight, the intent of the grantor in executing the deed, and a mistake of fact.

On the hearing no proof was offered by the complainants of either a mutual mistake of law or of fact.

These allegations of the bill were the only ones that gave the court below, sitting in equity, jurisdiction over the case, and in default of proof of them, the court should have dismissed the bill.

These allegations are the jurisdictional facts in the case, and the proofs must agree with the allegations—*Foster v. Goddard*, 1 Black, 518; *Rubber Co. v. Goodyear*, 9 Wall. 793. The recovery must be had upon the case made by the pleadings or not at all. *Grosholz v. Newman*, 21 Wall. 488. A party is not allowed to state one case in his bill and make out a different one by proof, the *allegata* and *probata* must agree, the latter must support the former. *Boone v. Chiles*, 10 Pet. 209.

POINT IV.

If this bill was filed to have the court, sitting in equity, construe the said deed of January 8, 1870, the court had no jurisdiction to do so, except as incidental to the administration of equitable relief, and as none was alleged in the bill excepting the reformation of the said deed because of mistake, the bill should have been dismissed for want of jurisdiction.

The respondents-(complainants) allege in the Eighth paragraph of their bill, that:

“The said John S. Watts intended to and did convey to Christopher E. Hawley, by the deed of January 8, 1870, Baca Float No. 3, as the same is described in paragraph 2 hereof” (that is, the original location of June 17, 1863) “as appears by the express terms of the said deed,” that is, that the said John S. Watts “has remised, released, and quit claimed,” &c.,

reciting at length the words of said deed, omitting the particular description of the land, concerning which the allegation reads :

“and the description by metes and bounds which have been omitted, and stars substituted in its place, was used under the *mistaken belief* existing at the time said deed was made as to the metes and bounds of the Float.”

By paragraph Nine it is further alleged that :

“The foregoing is the *correct construction* to be put on the deed of January 8, 1870, and is supported by the *following facts*—On or about March 2, 1863, the said John S. Watts executed and delivered to one William Wrightson, a title bond for said Baca Float No. 3, and prior to January 8, 1870, the said Christopher E. Hawley had become entitled to and was in possession of said title bond, and entitled thereunder to have a fee simple title to Baca Float No. 3, as described in paragraph 2 hereof, made to him, and the plaintiffs as successors in title to said Hawley, or own and possess said title bond.”

On the allegations contained in these two recited paragraphs, the complainants demanded judgment against the defendants :

“That the deed, dated January 8, 1870, * * * from John S. Watts to Christopher E. Hawley, and described and referred to in paragraph 6 of the complaint herein, *conveyed* to said Hawley, the tract of land in Santa Cruz County, Arizona, known as Baca Float No. 3,”

describing by metes and bounds the original location of June, 17, 1863.

The allegation in the Eighth paragraph of the bill, that the particular description of the land in the deed of January 8, 1870, “was used under the mistaken belief existing

at the time said deed was made as to the metes and bounds of the said Float," was not proved, and must be dismissed from consideration. In any event, it could not be made the foundation for the "correct construction" of the deed, but for its reformation or cancellation.

By paragraph Nine of their said bill the complainants seem to contemplate a "correct construction" of the said deed by reference to a title bond from said Watts to one Wrightson therein recited. But it was not proved on the hearing, that by the said bond the said Watts agreed to convey to the said Wrightson Baca Location No. 3, as located on June 17, 1863; nor that the said bond was assigned to the said Hawley; nor that the said deed of January 8, 1870, was executed by Watts in pursuance of said bond; nor does it appear from the said bond itself that it in any way related to Baca Location No. 3.

Furthermore, the construction of a deed, that is, the determination of a legal title, is not within the jurisdiction of a Court of Equity.

Equity cases under the constitution, the Supreme Court says in *Irvine v. Marshall*, 20 How. 565, are those suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in equity jurisprudence.

The Court of Errors and Appeals of New Jersey, in *Hart v. Leonard*, 42 N. J. Eq. 419, says:

"No doubt many cases arise in which Courts of Equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can be classified under the following heads—

1. Cases where the legal right has been established in a suit at law, and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not attainable by legal procedure.

2. Cases where the legal right is admitted, and the object of the bill is the same as in the class just mentioned.

3. Cases where the legal right, though formally disputed, is yet clear, on the facts which are not denied and legal rules which are well settled, and the object of the bill is as before."

Neither these three heads of equity jurisdiction nor the others given, include the construction of a deed so as to establish a legal title.

A court of equity has no jurisdiction to construe a deed, save as such construction may be incidental to the granting of equitable relief. It cannot, in a suit to quiet title, construe a deed for the purpose of establishing a legal title on which, in the suit pending, the complainant might maintain his suit.

"In order to induce action on the part of the court, his own title must be perfectly clear and paramount to the supposed cloud, and he must not be in the situation of bringing an action of ejectment in the Court of Chancery."

Essex Co. Bank v. Harrison, 57 N. J. Eq. (12 Dick.) 97.

The Court of Errors say in *American Dock Co. v. Trustees*, in 37 N. J. Eq., (10 Stew.) 271:

"The general rule is that a court of equity has no jurisdiction to establish by its decree the title to lands, its jurisdiction being limited to an interposition to quiet the possession of a party after his title had been determined by a court of law. The principle upon which courts of equity interposed to quiet the title was, that judgments in ejectment, not being conclusive, and operating only to transfer the possession, without conclusively settling the title, a court of equity, after the title had been satisfactorily de-

terminated by action at law, would interpose to put an end to further litigation—the *court assuming that the complainants' legal title had already been determined at law*, intervened to prevent a litigation which had become vexatious and oppressive, because unnecessary and unavailing.”

See also *Sheppard v. Nixon*, 43 N. J. Eq. (16 Stew.) 633.

The Court of Chancery of New Jersey in *Palmer v. Sinnickson*, 59 N. J. Eq. (14 Dick. Ch.) 535, in a statutory suit to quiet title, say:

“Equity will not, when no equitable question is presented, entertain a suit to declare, as is asked in this bill, that the complainants' title is good, and that the defendants' claim is bad. The determination of the sufficiency of purely legal titles to land, dis-associated from questions of trust or other matters of equitable nature, must be invoked in courts of law.”

The same rule obtains in actions of dower. The court says in *Vreeland v. Vreeland*, 49 N. J. Eq. (4 Dick. Ch.) 322:

“But a court of equity will not try a question of legal title, nor decree whether the widow is legally entitled to dower. If the title to dower is disputed, the right must be established at law.”

So also in partition.

Hay v. Estell, 2 C. E. G. 252.

Riverview Cemetery Co. v. Turner, 24 N. J. Eq. (9 C. E. G.) 18;

Hoyt v. Tuers, 52 N. J. Eq. (8 Stew.) 363.

The same rule prevails with regard to the construction of wills. The claimant of a purely legal title under a devise, seeking only to establish his title against that of the

heir at law by the construction of the will, must assert his rights at law and not in equity.

In *Torrey v. Torrey*, 55 N. J. Eq. (10 Dick. Ch.) 444, the court says :

“The generally accepted doctrine is that above declared, and is consistent with the long established rule that the forum in which to settle the legal title to land is a court of law.”

Citing and reviewing numerous cases.

A court of equity has no jurisdiction to determine a mere question of legal title.

North Penna. Coal Co. vs. Snowden, 42 Penna. St. 488.

Grubbs' Appeal, 90 Penna. St. 228.

In this case the Court says, on page 233 :

“It is sufficient to say in regard to this, that the proper construction of a deed is not a subject of equity jurisdiction.”

And on page 235, that

“Orders and decrees in equity where there is no jurisdiction, are simply *coram non judice*.”

From the above cited cases, to which many others might be added, it is abundantly established that a Court of Equity has no jurisdiction to determine by construction a mere question of legal title to land, and on this ground the Court should have dismissed the bill for want of jurisdiction.

The objection to the jurisdiction of the Court was not made by the pleadings, nor was it suggested by counsel to the Court on the hearing, but it seems to me to be one of which the Appellate Court, of its own motion, will take notice, and to which it will give due effect.

Lewis v. Cocks, 23 Wall. 470.

Brown v. Lake Superior Iron Co., 134 U. S. 535.

Allen v. Pullman Palace Car Co., 139 U. S. 662.

Minnesota v. Hitchcock, 185 U. S. 382.

POINT V.

If this bill was filed to quiet the title of the complainants to the land in dispute, it should have been dismissed for want of jurisdiction, because the complainants did not allege nor prove that they had the legal title to, or possession of, the said land. The Court could not in this suit construe the deed conveying an equitable title to the land in controversy so as to create a legal title to it in the complainants; and, having done that, in the same suit, quiet the title to the land thus decreed to be a legal title. The bill was in this respect multifarious and should have been dismissed on that ground.

Bills to quiet title belong to the jurisdiction of Courts of Equity, and when a bill is filed in the courts of the United States, it is governed by the general rules of equity practice.

The legislatures of the states have been allowed to dispense with some of these rules, for instance, with the rule requiring possession in the complainant, and such statutes have been accepted and enforced by the courts of the United States, but the general rules which govern the jurisdiction in equity cannot thus be dispensed with (*Frost v. Spitley*, 121 U. S. 557). In such suits it is always the title, that is to say, the *legal title* to the land that is to be quieted against claims of adverse interests or titles; and as the foundation for the relief sought, the complainant must allege and prove that he has the legal title to the premises (*Holland v. Challen*, 110 U. S. 25; *Dick v. For-*

aker, 155 U. S. 414), or as Mr. Justice GREER says in *Orton v. Smith*, 18 How. 265 :

“Those only who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.”

St. Louis v. Knapp, 104 U. S. 658.

Holland v. Challen, 110 U. S. 25.

Frost v. Spiteley, 121 U. S. 557.

Ely v. N. M. R. R. Co., 129 U. S. 293.

Whitehead v. Shattuck, 138 U. S. 151.

Simons Week Coal Co. v. Moran, 142 U. S. 449.

Wehrman v. Conklin, 155 U. S. 325.

Dick v. Foraker, 155 U. S. 414.

2 *Story Eg. J.*, §859.

1 *Pom. Eg. J.*, §248, §293.

Whitehouse v. Jones, 12 L. R. A. (N. S.) 49.

The complainants below, by paragraph 8 of their bill, alleged that the deed of January 8, 1870, from Watts to Hawley, on its face, conveyed to the latter the legal title to Baca grant No. 3 as originally located on June 17, 1863; and by paragraphs 26 and 28, that by mesne conveyances the tract of land so conveyed was deeded to them, and that they are “the owners” of said tract of land, and in possession of it.

If this suit was designed by the complainants to be one to quiet the title to the land here in dispute, *i. e.* Baca grant No. 3 as located on June 17, 1863, it is clear that the jurisdiction of the United States Court was invoked on the ground that the complainants, having both the fee simple title to, and possession of, the grant, had no adequate remedy at law.

In these circumstances, under the practice in equity prevailing in the courts of the United States, the complainants below, to maintain their suit, must have alleged and proved an established, undisputed, legal title to the tract of land in litigation, and the possession of it. Here the juris-

diction attached solely because of the possession alleged, otherwise the complainants would have had, on their bill, an adequate remedy at law by an action of ejectment. The possession, here the source of jurisdiction, was predicated upon the holding of the legal title. Jurisdiction was not invoked under the statute of Arizona relating to actions to quiet title (Rev. Stat., Section 4104), but under the general equity jurisdiction of the courts of the United States.

Legal title to the land in dispute was not alleged by the complainants in their bill, nor possession, and neither was proved on the hearing.

The allegation respecting title is found in paragraph 26 of the bill, which reads, that

“On or about February 8, 1907, the said S. A. Syme and the heirs, devisees, and legal representatives of the said Alexander F. Mathews sold and conveyed the land annexed by deed from Watts to Hawley, referred to in paragraph 6 hereof, to the plaintiffs by deed, * * * and ever since February 8, 1907, plaintiffs have been and now are *the owners of said land.*”

This allegation is insufficient. The complainants must allege that they are the owners in fee simple, or of the legal title, or use other words importing the legal title (*St. Louis v. Knapp*, 104 U. S. 658; *Simons Week Coal Co. v. Moran*, 142 U. S. 449). In *Ely v. Rail Road Co.*, 129 U. S. 293, the Supreme Court, in construing the Arizona statute to quiet titles, say:

“And allegation, in ordinary and concise terms, of the *ultimate fact*, that the plaintiff is the *owner in fee* is sufficient, without setting out matters of evidence, or what have been sometimes called probation facts, which go to establish that ultimate fact.”

In *Dick v. Foraker*, 155 U. S. 414, the Court say:

“The rule in ejectment is that the plaintiff must recover on the strength of his own title, and not on the

weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and *title in the complainant is of the essence of the right to relief.*"

American Dock Co. v. Trustees, 37 N. J. Eq. 271.

Sheppard v. Nixon, 43 N. J. Eq. 633.

Essex Nat. Bank v. Harrison, 57 N. J. Eq. 97.

Bates' Fed. Procedure, sec. 129, p. 156.

In fact, at the time the complainants filed their bill, they had neither the legal title to, nor the possession of the land in controversy.

I have above shown, (*ante p.*) that a legal title to Baca grant No. 3, as originally located, vested in the heirs of Baca on April 9, 1864, by the approval of the Commissioner of the selection made by them on June 17, 1863, and that *the* legal title, the strict fee simple title, remained in the United States until the survey of the land had been approved by the Commissioner and filed in the local Land Office of Arizona. This procedure was necessary under the instructions of the Land Department of April 17, 1879, (*Wilson Cypress Co. v. Del. Pozo*, 236 U. S. 648), and operated to vest the fee simple title to the grant in the then grantee of the legal title of the heirs of Luis Maria Baca, viz. the appellant, the Santa Cruz Development Company.

This grant was by Congress; when thus perfected, it vested both the fee simple title and the possession in the grantee. It was tantamount to a conveyance with livery of seizin. 3 *Washb. Real Prop.*, sec. 2022; *Green v. Leiter*, 8 Cranch, 249; *North. P. R. R. Co. v. Myers*, 5 Mont. 126.

On the hearing the complainants undertook to prove possession of this grant of land as originally located on June 17, 1863, by the testimony of G. W. Atkinson, their alleged tenant, who claimed to hold possession of eighty acres of fenced land under a lease from the complainants dated June 17, 1914 (R. p. 232). But an examination of the bill demonstrates that such possession could

have been but constructive. It is a principle of universal application that the law never raises a constructive possession against the real owner of the land, *who, at the time of the said lease, was the United States*; and if an entry be wrongful, though it be under a deed, a possession thereby gained will extend only so far as the tenant shall occupy the premises.

Ewing v. Burnet, 11 Pet. 41.

Sabariego v. Maverick, 124 U. S. 297.

Gentile v. Kennedy, 8 N. M. 353.

The question for the decision of the court is not whether under the statutes of Arizona a complainant could, either in or out of possession, maintain a suit to quiet title to land, but whether having pleaded possession as the sole ground of the jurisdiction of the Court below, these complainants have proved it.

The complainants not having pleaded or proved possession of the land in dispute the Court, regarding this bill as one to quiet title, should have dismissed it for want of jurisdiction.

Furthermore, in this respect, that is, the quieting of the title to Baca grant No. 3, the bill is multifarious, and should have been dismissed on that ground. The bill alleges in paragraph 8 that the deed of January 8, 1870, from Watts to Hawley, "on its face" conveys the grant as originally located on June 17, 1863, *provided* the Court omits the particular description of the land contained in the deed, which describes an entirely different tract of land, viz. the amended location of 1866,—and the first prayer of the bill is, that the Court decree that that deed conveyed the original location of 1863. This result could only be arrived at by construction, and, as we have shown above (p.) a court of equity has no power to construe a deed for such a purpose. If the Court had that power, it could only be exercised on the ground that the deed contained two descriptions of the land intended to be conveyed, one the true and sufficient description of the land,

the other a description that was superfluous, and that might therefore be rejected. But that is not the case made by this bill. The complainants allege in paragraph 8 that "the description by metes and bounds which has been omitted, and stars substituted in its place (that is, the description of the amended location of 1866) was used under *the mistaken belief existing at the time said deed was made as to the metes and bounds of the tract.*" By reference to the preceding paragraph, the sixth, we learn that that "*mistaken belief*" existed at that time in the minds of the Land Office, the grantor and grantee.

Thus by the case made by the complainants' bill, the only construction that the Court could give to this deed of 1870 was by reformation or cancellation, because of "*the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float.*"

Since the complainants on the hearing introduced no proof of fraud, accident, or mistake in the making of the **said deed**, the Court below was without jurisdiction, and the bill should have been dismissed.

Assuming, however, that the Court below, sitting in equity, had jurisdiction to construe the said deed, and thus to create a legal title in the complainants by transmuting an equitable into a legal title simply by construction, it would have exhausted its power and jurisdiction in that suit by decreeing that remedy. The Court could not allow the complainants in the same suit to unite other matters, perfectly distinct and unconnected, against the same defendants; *Ex. gr.*, it could not in the same suit quiet the title to the land the legal title to which it had created in the complainants by its decree.

The Court says in *Chapin v. Sears*, 18 Fed., 814 :

"It appears from the prayer and the allegations of the bill that the complainant has filed it for two objects: (1) to determine and settle a legal title; and (2) for the partition of a tract of real estate. In other words, it asks the Court to ascertain who are

the owners of the property, and then to divide it according to the interests of the parties as determined.”

The Court held the bill to be multifarious—

The objection of multifariousness, under the old practice, properly should have been made by demurrer, but the Court even then of its own motion might entertain such objection on the final hearing if embarrassment or confusion might result in executing the final decree.

Story Eq. Pl. §271, Note a, 10th Ed.

Emans v. Emans, 14 N. J. Eq. 118.

Walker v. Powers, 104 U. S. 250.

POINT VI.

The decree of the District Court being, in effect, by paragraph 6, that the tract of land here in litigation was segregated from the public domain of the United States on December 14, 1914; and the complainants having filed their bill on June 25, 1914, the bill should have been dismissed on the ground that while the fee simple title to and possession of the said land was in the United States, no suit could be brought by the complainants to establish their alleged legal title to the land.

Legal title in the complainants being necessary in the courts of the United States to maintain a suit to quiet the title to land, the above statement of facts renders argument unnecessary under this point.

One additional consideration, however, presents itself. If the Court in such cases should assume jurisdiction, the decree of the Court would be an attempt to anticipate and instruct the future decisions of the Land Department as to which one of contending parties it should issue the patent for the land—a matter clearly beyond the equitable jurisdiction of the courts of the United States.

Davidson v. Calkins, 92 Fed., 238.

Brandt v. Wheaton, 52 Cal., 431.

POINT VII.

The only remedy for the complainants on the facts alleged in their bill would be, after December 14, 1914, to file their bill in equity to have the Court decree, that the person to whom the patent for Baca Grant No. 3 issued or enured on the said date, in this case, by the decision of the Supreme Court in *Lane v. Watts*, supra, the appellant, the Santa Cruz Development Company, the legal representative of the original grantees, the heirs of Luis Maria Baca, held the said land in trust for them.

After the United States has parted with their title, and an individual has become vested with it, the equities subject to which he holds it may be enforced, but not before.

Johnson v. Towsley, 13 Wall. 72.

Shepley v. Cowan, 91 U. S. 330.

Moore v. Robbins, 96 U. S. 530.

Marquez v. Frisbie, 101 U. S., 473.

Smelting Co. v. Kemp, 104 U. S. 636.

Steel v. Smelting Co., 106 U. S. 447.

Monroe Cattle Co. v. Becker, 147 U. S. 47.

Turner v. Sawyer, 150 U. S. 586.

In re Emblon, 161 U. S. 56.

Michigan Land Co. v. Rust, 168 U. S. 592-593.

In the last case, the Court say :

“Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of legal title, * * * but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of patent. * * * After

the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings."

In *Marquez v. Frisbie, supra*, the Court say:

"We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States."

POINT VIII.

The right of the complainants below to demand this relief under the allegations of their bill, would rest upon an estoppel operated by the so-called title bond from John S. Watts to William Wrightson, dated February 2, 1863, in pursuance of which the said deed from said Watts to said Hawley, of January 8, 1870, is alleged to have been executed. But no estoppel was operated, because the complainants failed to prove on the hearing, that the said bond was assigned to their grantors or to them; or that the said deed of January 8, 1870, was executed in pursuance of said bond; or that by said bond or by said deed it was agreed by said Watts to convey, or that he conveyed, to the grantors of the complainants the legal title to the land here in dispute—the original location of Baca grant No. 3, of June 17, 1863.

The consideration of this question is presented to the Court because counsel conceives it to be within the power of the Court in a suit of this nature to dispose of all questions of title that may arise in order to prevent a multiplicity of suits.

The Supreme Court says in *Camp v. Boyd*, 229 U. S. 551:

"A court of equity ought to do justice completely and not by halves. One of the duties of such a court

is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

The complainants' future right to file a bill to ask that the appellants, the Santa Cruz Development Company, hold the land here in dispute in trust for them under the allegations of their bill, would rest upon the so-called title bond from said Watts to said Wrightson, and the deed of January 8, 1870, which they alleged, but did not attempt to prove on the hearing, was executed in pursuance of it. It is to demonstrate that no such right exists, and to have the Court now determine that fact, in order to prevent a multiplicity of suits, that argument under this point is presented.

Paragraph 9 of the Bill reads as follows, viz. :

"The foregoing is the correct construction to be put on the deed of January 8, 1870, Exhibit 'A' (*i. e.*, that it conveyed Baca grant No. 3, as located on June 17, 1863) and is supported by the following facts. On or about March 2, 1863, the said John S. Watts executed and delivered to one William Wrightson a title bond for said Baca Float No. 3, and prior to January 8, 1870, the said Christopher E. Hawley had become entitled to and was in possession of said title bond, and entitled thereunder to have a fee simple title to Baca Float No. 3, as described in paragraph 2 hereof, made to him, and the plaintiffs, as successors in title to said Hawley, now own and possess said title bond."

The complainants alleged that this title bond was the foundation of their title to the land in dispute. It was of necessity, executory, and, to execute it, the plaintiffs allege Watts made to Hawley the deed of January 8, 1870. This terminated the life of the bond.

Howes v. Barker, 3 Johns. (N. Y.) 508, 509.

But this title bond is sought to be used not only to prove an agreement by Watts to convey lands to Wrightson, but to prove what lands he agreed to convey, while alleging that the conveyance was in pursuance to the bond. It cannot be used for such purpose.

Mr. SUGDON, in his work on Vendors, Vol. I, p. 496, Sect. 16 (Am. Notes by Perkins) says:

“When a question arises as to what lands are conveyed to a purchaser, the previous contract is not admissible at law, although it expressly names the *locus in quo* as a part of the land to be sold.

Citing *Williams v. Morgan*, 15 Q. B. 782, the note of the American Editor reads: “The articles of agreement for the conveyance of land are generally merged in the deed made, delivered, and accepted in pursuance of them.” Citing numerous cases.

See

Dean v. Mason, 4 Conn. Repts., 432, and cases cited.

Parker v. Hains, 22 How. 18.

Hinde v. Longworth, 11 Wheat. 214.

Moran v. Prattier, 23 Wall. 502.

But the futility of the assertion by the complainants, or by William Wrightson, of any claim of title to the land herein in dispute, the location of June 17, 1863, will become manifest by an examination and consideration of the title bond itself.

In the agreement of March 2, 1863, made by and between John S. Watts and William Wrightson, Watts recites that he is “the owner of one of the unlocated floats, containing about one hundred thousand acres of land, granted to the heirs of Luis Maria Baca by act of Congress approved 21 June, 1860.”

Watts further recites that he “has full power and authority to make the location of said heirs under said act, and

cause to be made a title in fee for the same after such proper location and survey."

Admitting that Watts and his heirs would be estopped from denying the facts thus stated in this agreement, because the assumed existence of the facts recited formed the basis of the agreement, (*16 Cyc.* 719): yet, by the terms of the agreement itself, no estoppel could become operative against him and his heirs by reason of these recitals, until "after such proper location and survey," that is location by Wrightson, as will later be shown, and survey by the Government, of the location which the agreement purported to convey, and if the operation of the agreement was limited as to time by its terms, no estoppel could enure after the expiration of that time. *Smith, Leading Cases*, 710, Ed. 1866.

The agreement further recites: "Now therefore be it known that I, the said John S. Watts, have this day sold to Wm. Wrightson of the City of Cincinnati, State of Ohio, the said unlocated float, with all its privileges, for and in consideration of the sum of one hundred and ten thousand dollars, the receipt whereof is hereby acknowledged, and I hereby bind myself, my heirs, executors or administrators to make a full and complete title in fee simple for said land to said William Wrightson, his assigns or legal representatives, whenever thereunto required."

This was not a sale of land by Watts to Wrightson; it lacks every requisite of a deed for land; for it is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given in the instrument (*Chinoweth v. Haskell*, 3 Pet. 95). The same principle would, necessarily, and as against the creation of an estate by estoppel, be applicable to an agreement for a deed to land to be subsequently made, because that certainty and identity of description of the land, that are required by an estoppel would not exist (*Gilmer v. Poindexter*, 10 How. 267). Hence this agreement, if of any legal effect, was a sale by Watts to Wrightson of the use of a power in land which

had been granted by the Sixth Section of the Act of June 21, 1860, to the heirs of Baca, as in full recited by the agreement.

The agreement further recites "And I, the said John S. Watts, hereby authorize and empower the said W. Wrightson to make the location under the said Act in as full and ample manner as the said heirs could do the same."

From this paragraph, taken in connection with the preceding ones, the purpose and effect of the agreement becomes determined. Watts assigned to Wrightson the use of the power to locate one of the five floats, the power to locate which had been granted to the Baca heirs by the said Sixth Section of the Act of June 21, 1860, and authorized him to make such location "in as full and ample manner as the said heirs (of Baca) could do the same."

By this agreement and transaction, no legal title to any certain or specific land was conveyed, for nothing specific or certain was vested in Watts; and the power of locating was a power to locate in the name of the heirs of Baca, not in that of Watts or Wrightson (*Gilmer v. Poindexter*, 10 How. 166). The location was to be made by Wrightson and not by Watts; the latter nowhere agrees that he will make it, or cause it to be made; and it is not needful for the proper execution of the power, that such an agreement should be imported into the contract. What Watts did agree to do was to "cause to be made a title in fee simple for the same" "after such proper location and survey," that is, proper location by Wrightson, in the name of the heirs of Baca, and survey of such location by the Government.

If the Baca heirs should have, subsequent to this agreement, located in their own name, any or all of these five floats, the right to locate which had been granted to them by the sixth section of the Act of June 21, 1860; and should now a patent be issued to them for one or all of such floats, or to John S. Watts, or the heirs of Watts, as purchasers of one or more of these locations from the heirs of Baca, at a time subsequent to the dates of this agreement, no

legal title by estoppel would enure to Wrightson, or to his legal representatives by reason of the acquisition of such title. *Gilmer v. Poindexter*, 10 How. 267.

In this case the Court say :

“But we are of opinion that in this instance no estoppel has been operated. This legal effect can occur only where a party has conveyed a precise or definite legal estate, by a solemn assurance, which he will not be permitted to vary or deny. It can have no operation to prevent the denial of an equitable transfer of title, which is not identical with the legal title or muniment of title, which it may be relied on either to establish or protect.”

Further, the power to locate which was assigned to Wrightson by the agreement, was limited by the instrument, and by the sixth section of the statute of June 21, 1860, which was therein recited, to three years after the approval of the statute, to wit, June 21, 1863. It was not proved on the hearing that within that time Wrightson exercised the power to make the location of one of the five floats, and consequently the power lapsed. By his laches, Wrightson forfeited all rights under the agreement between Watts and himself. He, and his assigns, and legal representatives are without remedy at law, and equity will not interfere where there has been a non-execution of a power. *Story Eq. Juris. Sec. 169.*

On June 17, 1863, the heirs of Baca, by John S. Watts their attorney, located Baca Float No. 3, the lands here in dispute, in Pima County, Arizona, and about the same time they located, through Watts as their attorney, Baca Float No. 5 in Yavapai County, Arizona.

On May 1, 1864, some of the heirs of Baca quit claimed to Watts, Baca Locations Nos. 2, 3 and 4 “for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further

consideration of three thousand dollars paid by the said John S. Watts.”

On May 30, 1871, the heirs of Baca “granted to Watts Baca Location No. 5; and ratified and confirmed the title made by them to Watts on May 1, 1864, to Locations Nos. 3 and 4 in said deed of May 1, 1864, mentioned and described,” that is the location of June 17, 1863.

It was contended by the complainants that the agreement between Watts and Wrightson of March 2, 1863, was a “title bond” by which Watts sold Baca Float No. 3 to Wm. Wrightson, and “bound himself, his heirs, executors or administrators to make full and complete title in fee simple to said Wm. Wrightson, his assigns or legal representatives whenever thereunto requested.”

Assuming, for the sake of argument, that the agreement of March 2, 1863, was a “title bond,” it was not a title bond for “Baca Float No. 3” as is contended, but what it purported to sell was “the said unlocated float with all its privileges”, and as a “title bond” it would be void for uncertainty. The rules of law applicable to a deed for land are applicable to an agreement for such a deed. Mr. Washbourne (on Real Estate) says at Sec. 2289, “A description of the thing granted is of course a most important part of a deed, as its purpose is to identify that upon which other clauses of the deed are designed to operate; and if the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case.”

In the same paragraph, the ninth, it is alleged that the said Watts fulfilled his said contract with Wrightson by executing the deed of January 8, 1870, to Christopher E. Hawley.

The complainants below not having proved on the hearing, that by the said title bond and the deed of January 8, 1870, alleged to have been executed in pursuance of it, the legal title to the land in dispute was vested in them; that title, as between them and the appellants, the Santa

Cruz Development Company, was in the said company as the legal representative of John S. Watts.

In truth, this fact is pleaded by the complainants in paragraph 12 of their bill, where they allege that:

“By the title bond hereinbefore referred to, all the heirs of Luis Maria Baca, or of John S. Watts, held the title, if any remained in them, in view of the deeds of May 1, 1864, and of May 30, 1871, and of January 8, 1870, hereinbefore referred to, in trust for the said Christopher E. Hawley, and his successors in title, including the plaintiffs.”

If the appellant, the Santa Cruz Development Company, as the successor of John S. Watts, thus holds the title to the land in dispute in trust for the complainants below, as the bill alleges, it must hold it as the owner of the legal title; and if the said complainants can show a better right, a Court of Equity will, as above shown, convert the company into a trustee, and compel it to convey the legal title. But, under these circumstances, the court will not in the same suit, or in this suit, quiet the title to the said land.

This twelfth paragraph of the complainants' bill of complaint furnishes another instance of its multifariousness. It not only seeks (1) to reform the deed because of mistake; to (2) construe the said deed, and (3) upon such construction to have the court quiet the title thus created, but (4) the complainants allege that, in any event, the legal title to the land is held in trust for them by the successors in title to the heirs of the original grantee, Luis Maria Baca.

POINT IX.

The said deed of January 8, 1870, conveyed to the said Hawley no right, title or interest to the original location of Baca grant No. 3, of June 17, 1863, by reason of the fact that the tract of land—the attempted amended location of 1866—particularly described in said deed, to some slight extent overlaps the original location of June 17, 1863, to which the grantor, Watts, then had the legal title.

It will be found by reference to the map showing the location of 1863, and the attempted amended location of 1866 of Baca grant No. 3 (R. 379) that the latter overlaps the former to some slight degree at the northeast corner. From this fact it may be argued that the deed of January 8, 1870, from Watts to Hawley, in any event, conveyed to the latter the land embraced within the overlap to which Watts then had the legal title.

Evidently, no one but the successors in title to Hawley, Messrs. Watts and Davis, the complainants below, can make such claim—and it cannot be made by them on the allegations of their sworn bill of complaint. By paragraphs 7, 8 and 9 of their bill they allege that there was no tract of land such as is described by the attempted amended location of 1866; that such description was inserted in the said deed of 1870 by mistake, and that when Watts executed said deed to Hawley, he intended to and did, convey the original location of 1863, and not the attempted amended location of 1866, therein particularly described by metes and bounds.

The court, so far as the complainants below are concerned, must construe the deed according to the allegations of their bill.

Section 2 of the Arizona statute regarding conveyances (Sec. 2050, Civil Code, 1913) has no application to this case. It contemplates the intention of the grantor to

convey an estate in land to which he had title, and, in the expression of that intent by deed, he conveys not only that estate, but also a larger one to which he has no title. The statute simply provides that the deed shall be construed to convey the smaller estate to which the grantor had title.

POINT X.

The instrument of writing executed by and between the heirs of John S. Watts and David W. Bouldin, dated September 30, 1884, under which James E. Bouldin, Jennie N. Bouldin, Joseph E. Wise, Lucia J. Wise, and W. G. Rifenburg, defendants below, claim title to the land in dispute, was not a deed but an executory contract, and being a contract that related solely to property which had no actual or potential existence, it was nudum pactum and void.

There is nothing contained in this document that would lead the court to construe it as a deed *in praesenti*, excepting the use of the words of conveyance "grant, bargain and sell."

The rule of law is that the intent of the parties is to be ascertained from the whole instrument. It is thus stated in *Devlin on Deeds*, Sec. 7—

"The strongest words of conveyance in the present time will not pass an estate, if from other parts of the instrument a contrary intent be apparent. * * * Enough formal and apt words may be used in a deed, yet, if it be apparent from the other parts of the instrument, taken and compared together, that all that was intended was a mere agreement for a conveyance, the intention shall prevail."

Jackson v. Clark, 3 Johns, R. 424.

Jackson v. Myers, 3 Johns. R. 383.

Atwood v. Cobb, 33 Mass. (16 Pick.) 229.

Williams v. Payne, 169 U. S. 55.

Taylor v. Burns, 203 U. S. 120.

Chavez v. Bergere, 231 U. S. 482.

If this instrument had any validity, it was as an executory contract. It did not purport to create in Bouldin a power in land coupled with an interest, but an interest to be produced by the exercise of the power granted (*Hunt vs. Rousmaniere*, 8 Wheat. 203). It was void whether regarded as a contract or as a deed—for the property described in it had no actual or potential existence, and the consideration to be performed regarding such property was impossible of performance.

By this instrument, *which was executed by both the heirs of Watts and Bouldin*, the former “granted, bargained and sold” to the latter Baca Location Nos. 2, 3 and 4. The heirs of Watts had no title to Locations 2 and 4, and as to Location No. 3, the instrument recited:

“Also Location No. 3, which was also located under and by virtue of the aforesaid 6th section of an act of Congress passed June 21, 1860. Said location was heretofore duly surveyed in accordance with the provisions of said act, and the field notes returned to the proper office, but the surveyor general disapproved the same, as being located on mineral land. Said location is described as follows;”

giving a description by metes and bounds of the location of June 17, 1863.

Evidently from this recital, *which is that of both parties*, the estate in Baca Location No. 3 which was intended to be conveyed was understood to be an equitable and not a legal one.

This is made more manifest from the consideration moving from Bouldin which is thus stated:

“And for the further consideration, covenants and agreements to be performed by the party of the second part (Bouldin) as hereinafter mentioned, and for the purpose of compromising and settling the claims of

title between the parties of the first and second parts, and of *perfecting and quieting the title to the lands hereinafter described.*"

In the instrument it was further covenanted and agreed :

"And also, if in *perfecting the title to Location No. 3* above described, other lands or land certificates shall be granted by the United States government, in lieu thereof, then in that event, the parties of the first part hereby bargain, sell, grant, and convey to the party of the second part an undivided two-thirds of such other lands or land certificates as may be received by them in lieu of the lands aforesaid."

Bouldin further covenants to use due diligence in prosecuting these claims, at his own cost and charge,

"and also to the *perfecting of the title to Location No. 3*, above described, from the government of the United States, or acquiring other lands or land certificates in lieu thereof, if the same can be recovered from the government of the United States."

The Watts heirs constituted Bouldin their attorney in fact to carry out the object of the agreement.

The heirs of John S. Watts had, when they executed this agreement, an indefeasible, legal title to this grant, Baca Location No. 3, as located on June 17, 1863, the reversion of the legal title to the United States having been destroyed by the action of the Commissioner of the Land Office on April 9, 1864 (*Lane vs. Watts*, 235 U. S. 20), and the United States retained the strict legal title and possession until the issuance to the heirs of a patent, or its equivalent, the issuance of which they could not control (*Gibson vs. Chouteau*, 13 Wall. 100) and which, most certainly, Bouldin under this contract could not compel; and, therefore, there was no imperfect title to the grant that could be "perfected" or "quieted" by any effort or action by D. W. Bouldin. This alleged imperfect title had no exist-

ence, either actual or potential. It could not be made the subject of contract or grant, for to make a contract or grant valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant (*2 Kent's Com.* 468; *Story Eq. Jurisp.*, sec. 1040; *Tiedman on Real Prop.*, sec. 799; *Mitchell vs. Winslow*, 2 Story, 368; *Jones vs. Richardson*, 10 Mete. (51 Mass.), 488; *Pennock vs. Coe*, 23 How. 127). This instrument conveyed nothing; it was a contract about nothing; a "mere scrap of paper."

Consequently, there was no Baca Location No. 3, the title to which Bouldin under this contract could "quiet" or "perfect"; there were no other lands or land certificates to be acquired by Bouldin in lieu thereof from the government of the United States; there was no great diligence that Bouldin could exercise, nor sums of money that he could expend in doing—nothing. The agreement was *nudum pactum*, it was impossible of fulfillment; it was void both at law and in equity.

Mr. Pollock in his work on Contract, on page 400, says:

"On the first and simple rule—that an agreement impossible in itself is void—there is little or no direct authority, for the plain reason that such agreements do not occur in practice, but it is always assumed to be so."

Notwithstanding "such agreements do not occur in practice," here we have one. And notwithstanding all the transparent circumstances of doubt and illusion surrounding this transaction, Bouldin in 1885 succeeded in selling to Messrs. Ireland and King a one-third interest in this agreement, and they, in turn, unloaded it on the defendant, Joseph E. Wise, who, in his answer filed in this case, alleges that under this agreement, and the purchase by him at Sheriff's sale of all the interest of D. W. Bouldin in Baca Location No. 3, he is seized of the legal title to an undivided two-thirds interest in the land here in controversy. Mr. Wise took nothing by either instrument.

POINT XI.

The grant from the United States to the heirs of Luis Maria Baca by the sixth section of the Act of June 21, 1860, was exclusively to "the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas," and did not embrace heirs of said Baca who did not "make claim" to the surveyor general of New Mexico, or to Congress pursuant to the provisions of the statute of September 30, 1854.

This point has been fully discussed in a separate brief filed by the counsel of the respective parties appealing from so much of the decree as awarded an undivided 1/38 of the grant to Joseph E. Wise and Lucia J. Wise respectively, and here needs no further consideration.

The decree of the Court below should be reversed and the bill of complaint dismissed with costs; and judgment should be entered for the appellant, the Santa Cruz Development Company, on their answer and cross bill for Baca grant No. 3, as located on June 17, 1863, and quieting their title to the said tract of land against the claim of the other parties to this suit.

JAMES W. VROOM,
Counsel for the Appellant,
Santa Cruz Development Company.

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH E. WISE, et al., <div style="text-align: right; margin-right: 20px;">Appellants,</div> <div style="text-align: center; margin: 10px 0;">vs.</div> CORNELIUS C. WATTS, et al., <div style="text-align: right; margin-right: 20px;">Appellees.</div>	}	NO. 2719.
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Brief for Appellants
JOSEPH E. WISE AND LUCIA J. WISE

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Attorney for Appellants

Filed thisday of....., 1916.

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Clerk.

FEB 2 - 1916

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Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH E. WISE, et al.,

Appellants,

vs.

CORNELIUS C. WATTS, et al.,

Appellees.

NO. 2719.

Brief for Appellants

JOSEPH E. WISE AND LUCIA J. WISE

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United States Court of Appeals

FOR THE NINTH DISTRICT

JOSEPH E. WISE, et al.,
Appellants,

vs.

CORNELIUS C. WATTS, et al.,
Appellees.

NO. 2719.

BRIEF FOR APPELLANTS JOSEPH E. WISE AND LUCIA J. WISE.

SELIM M. FRANKLIN,
Attorney for Appellants.

STATEMENT OF THE CASE.

This is a suit to quiet title, brought by Cornelius C. Watts and Dabney C. T. Davis, as plaintiffs, to quiet their title to a certain tract of land containing nearly 100,000 acres, in Santa Cruz (formerly Pima) County, Arizona called "Baca Float No. 3."

All the defendants deny plaintiffs' title, and each defendant filed a cross bill asserting title in himself,

either to all of the tract or to a certain undivided interest therein, adversely not only to plaintiffs, but to the other defendants.

The lower court, in its decree, adjudged the title as follows:

- (1) Joseph E. Wise, an 1-38 interest.
- (2) Margaret W. Wise, an 1-38 interest.
- (3) Watts and Davis, plaintiffs, an 18-19 interest in the south half of the tract.
- (4) Jennie N| Bouldin, an 18-38; David W. Bouldin, an 18-76 and Helen Lee Bouldin, 18-76; being a total of 18-19 interest, in the north half of the tract.

The court further decreed that a temporary injunction theretofore issued, restraining Joseph E. Wise from erecting certain fences on the tract, be made perpetual, as to the south half thereof.

From this decree Joseph E. Wise and Lucia J. Wise, his wife, have appealed to this court. All the other parties except Jesse H. Wise and Margaret W. Wise have also appealed from the decree.

This brief is written and submitted for Joseph E. Wise, appellant, as claimant of an undivided (approximately) two-thirds interest in the entire tract, and sole owner of a certain 160 acres thereof; and for his wife, Lucia J. Wise, appellant, as claimant of a certain 40 acres thereof.

HISTORY OF BACA LOCATION NO. 3.

On June 21, 1860, Congress passed an Act (12 Stat. at L. 71, Chap. 167), granting to the heirs of Luis Maria Baca, the right to select and locate five tracts of 100,000 acres each, on the unoccupied, non-mineral, public lands.

Section 6 of the Act is as follows:

“And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.”

Luis Maria Baca died in 1827. He was married three times. He had 19 children and these children, or their descendants, were living in 1860, when the above Act was passed.

Three different tracts of land were selected by John S. Watts, attorney for the heirs of Baca, as and for Location 3, under the rights granted to the heirs of Baca by the Act aforesaid.

The first tract was selected by him on October 30, 1862, being a tract of land of about 100,000 acres, in the form of a square, at a place known as the Bosque Redondo, on the Pecos river, Territory of New Mexico. This selection was approved by the surveyor general of New Mexico on November 8, 1862. However, on January 18, 1863, Watts made application to the Commissioner of the General Land Office to withdraw this selection, with a view to making another selection in a more desirable locality. This application was allowed February 5, 1863. 29 L. D. 45-46.

The second tract was selected by him June 17, 1863, being the tract in the Territory of Arizona, described as commencing at a point one mile and a half from the base of the Salero mountain, etc. This application is as follows:

“Santa Fe, New Mexico, June 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico.

I, John S. Watts, the attorney for the heirs of Don Luis Marie Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the Act of Congress approved June 21, 1860, the following tract, to-wit: Commencing at a point one mile and a half from the base of the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links; thence south twelve miles, thirty-six

chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, the same being situated in that portion of New Mexico, now included by Act of Congress approved February 24, 1863, in the Territory of Arizona. Said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge.

JOHN S. WATTS,
Attorney for the Heirs of Luis Maria Cabeza de Baca.”

Tr. p. 174.

This location or selection was approved by John A. Clark, Surveyor General of New Mexico, on June 17, 1863 (Tr. p. 175), and is the specific tract of land involved in this case, to which the respective parties seek to quiet their respective titles.

The third tract was selected by John S. Watts as attorney for the heirs of Luis Maria Baca, under an application of date April 13, 1866, made by him as attorney for the heirs of Luis Maria Cabeza de Baca, to the Commissioner of the Land Office, in which he states that the hostility of the Indians prevented a personal examination of the tract located by him in 1863, prior to his making the selection, and not having a clear idea as to the direction of the different points of the compass, when the selection was made, a mistake was made which would result in leaving out most of the land intended to be included in the location, and under these circumstances he requests—we will quote now from the application itself:

“that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north twelve miles, thirty-six chains and forty-four links; thence east twelve miles thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links, to the place of beginning. I beg leave further to state that the land which will be embraced by this change of the initial point is of the same character of unsurveyed, vacant and public land as that which would have been set apart by the location as first solicited, but it is not the land intended to have been covered by said location but the land to be included within the boundaries above designated is the land that was intended to be located, and was believed to have been located upon until preparations were made to survey said location.” Tr. p. 176.

In compliance with the foregoing application, the Commissioner of the Land Office, by letter dated May 21, 1866, addressed to the Surveyor General of New Mexico, directed that the survey of the location be made in accordance with the amended description as set forth in Mr. Watts' application of April 30, 1866. In this letter the Commissioner, amongst other things, said:

“The papers thus returned are herewith transmitted to you with directions that you cause the survey to be executed in accordance with the amended description in Mr. Watts' application of

the 30th April last, provided by so doing the out-boundaries of the grant thus surveyed **will embrace vacant lands not mineral.** Tr. p. 177.

The tract of land described in this amended location is what we call the 1866 location, being the third selection made, as aforesaid.

The only two selections necessary to be considered in the present case are the 1863 location, and the 1866 locations.

The following diagram shows the tract as located in 1863, with the initial point one mile and a half N. 45° E. from the base of the Salero mountain, which we designate as Tract 1; and also shows the tract described in the amended location of 1866, with initial point 3 miles west by south from the building known as Hacienda de Santa Rita, which we designate as Tract 2; as more fully shown in Wise Exhibit 34, a map sent up with the record; and Transcript, p. 381 where this map is printed.

The map, Exhibit 34, and the following diagram taken therefrom, show the Salero mountain, being the initial point of the 1863 location; the Hacienda de Santa Rita, being the initial point of the 1866 location; and also show a tract of some 6,000 acres that is included within the limits of both locations. This tract we call the "overlap," being that part of the 1866 location which overlaps the 1863 location, and is common to both.

DIAGRAM OF 1863 and 1866 LOCATIONS. BACA LOCATION NO. 3

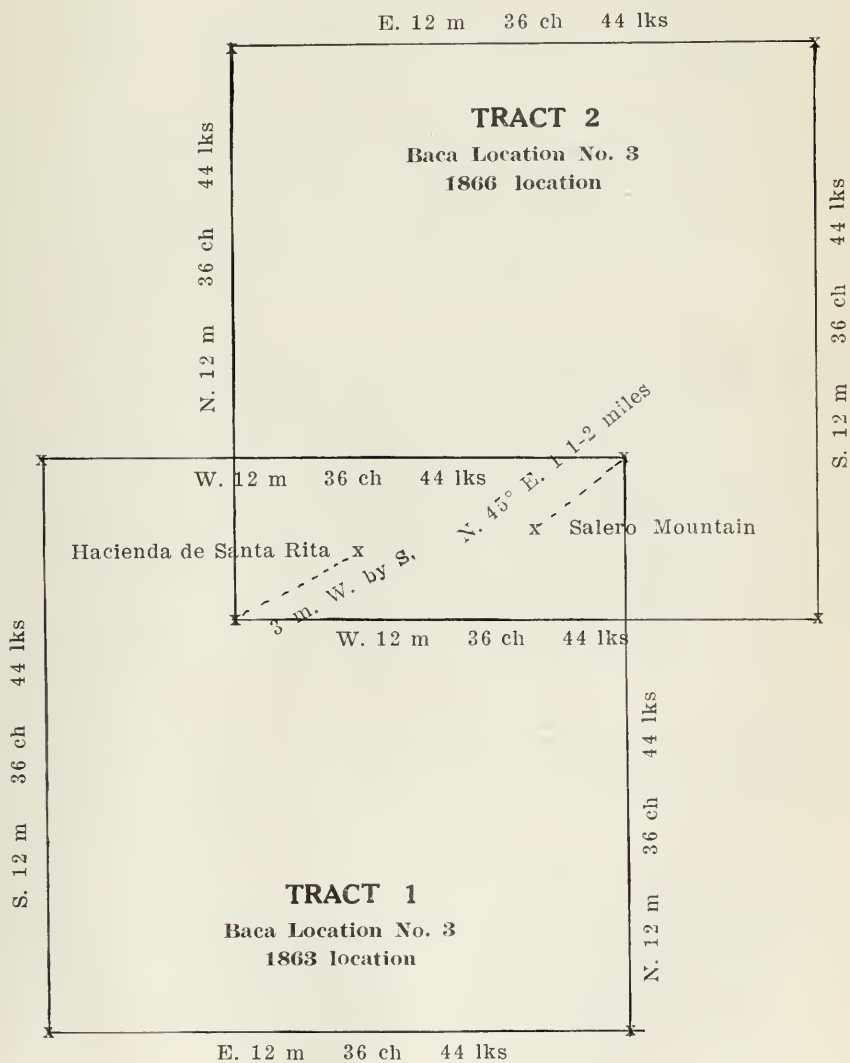


Diagram of 1863 and 1866 Locations, Baca Location No. 3.

The Salero mountain, being the initial point of the 1863 location, Tract 1, was and is a well known mountain, shown upon the maps of that period and thereafter.

The Hacienda de Santa Rita, the initial point of the 1866 location, Tract 2, consisted of a group of adobe houses, erected about 1860 by a mining company operating some mines in the Santa Rita mountains, and was and still is also a well known point.

J. Ross Brown in his book published in 1869, by Harper Brothers, entitled "Adventures in the Apache Country: Tour Through Arizona and Sonora," states that he visited the **Hacienda de Santa Rita** in 1860, and refers to the Baca Float No. 3 in the Santa Rita mountains. In this book is an illustration of the Hacienda de Santa Rita as it existed in 1860, when J. Ross Brown visited it. Tr., p. 251.

Tract 2, the 1866 location, is situated in the Santa Rita mountains, in what formerly was Pima, and now is Santa Cruz County, Arizona.

Tract 1, the 1863 location, is situated in the valley of the Santa Cruz river, extending into the foothills on either side thereof, also in what was formerly Pima, and since 1899 has been Santa Cruz County, Arizona.

From 1866, down to July 25, 1899, a period of over 33 years, the tract of land described in the 1866 location,

Tract 2 on the diagram, was known as "Location Number 3 of the Baca Series," or "Baca Float No. 3;" and it was considered by the Land Office as the tract of land which the heirs of Baca had selected as Location 3 under their right to locate the five tracts granted them by Congress. No survey of the tract, however, was made by the government of the United States; some of the Surveyors General holding that the selection was mineral land and not subject to selection, and some refusing to make the survey because the estimated expense thereof was not advanced by the grant claimants.

On July 25, 1899, upon the application of some of the grant claimants for a survey of this 1866 location, the Secretary of the Interior investigated the validity of the location, and in a decision, wherein he reviews in detail the history of the three selections, decided that the 1866 location was not an amendment of the 1863 location, although pretending to be such, but was, under the guise of an amendment, the selection of an entirely different tract of land; and he held that, as this 1866 selection was made after the expiration of the three years limited by the Act of Congress for the making of selections, it was invalid, and the claimants were bound by the selection made in 1863 to the tract described in that selection. 29 L. D. 44-54.

During the 33 years intervening from 1866, the date of the 1866 location down to 1899, when the Secretary made the foregoing decision, there were two different sets of claimants to Baca Location No. 3; one set claim-

ing the tract described in the 1863 location, and the other set claiming the tract described in the 1866 location. Many deeds were made by the different sets of claimants.

Those claiming the tract under the 1863 selection, described the land in their deeds according to the specific description set forth in the 1863 selection, that is, "Commencing at a point one mile and a half from the base of the Salero mountain in a direction north 45 degrees east from the highest point of said mountain, running thence" each course, west, south, east and north 12 miles, 36 chains and 44 links, being the Tract 1 on the diagram.

While those claiming the tract under the 1866 selection, described it as "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence" each course, north, east, south and west 12 miles, 6 chains and 44 links.

The plaintiffs in this action, and defendants Bouldin, deraign their title under that set of claimants to whom was conveyed the tract described in the 1866 location, being Tract 2 on our diagram.

Defendant Joseph E. Wise (appellant), defendant Santa Cruz Development Company and the Interveners deraign their respective titles under the set of claimants to whom was conveyed the tract described in the 1863 location, being Tract 1, on our diagram.

No survey of the 1863 location was made until 1905, when the Surveyor General of Arizona caused the same to be surveyed by Philip Contzen. The map of this survey is "Plaintiffs' Exhibit Q," sent up with the record in this case. On the diagram in this brief, the tract so surveyed is designated "Tract 1."

The Secretary of the Interior refused to file the plat and field notes of this survey. On the contrary, he ordered the land open to entry under the public lands of the United States. A suit was then brought before the Supreme Court of the District of Columbia, by certain claimants of Baca Location No. 3, against the Secretary of the Interior, wherein they sought to enjoin his disposing of said lands as public lands of the United States, and to compel him to approve and file the map and field notes made by Contzen, "for the purpose of defining the outboundaries of the land and segregating the same from the public lands of the United States."

That court, on June 3, 1913, granted the decree as prayed for. The Secretary of the Interior appealed therefrom to the Court of Appeals and then to the Supreme Court of the United States, and the Supreme Court of the United States, on June 22, 1914, decided that the approval by the Surveyor General of the tract selected by Watts in 1863 was final; that the title to that tract passed to the heirs of Baca at that time; that the United States had no title to the lands; and the court further ordered the field notes and the Contzen survey to be filed by the Secretary of the Interior, so that

the lands, as surveyed, could be segregated from the public domain. Lane vs. Watts, 234 U. S., 525-542.

After the Supreme Court rendered this decision, the plaintiffs in the present action, Cornelius Watts and Dabney C. T. Davis, Jr., who deraign their title under claimants of the 1866 location, brought the present suit, wherein they claim to be the owners of the tract described in the 1863 location, and seek to have their title quieted as against all the other parties to the action.

The Surveying, Monumenting and Platting of the 1866 Location, by George J. Roskruge, County Surveyor of Pima County, in 1887.

Repeated requests were made by certain of the grantees of certain of the heirs, to the various Surveyors General of Arizona, to make survey of Tract 2, the amended selection of 1866, but the respective Surveyors General repeatedly refused to do so, principally because the estimated expense for making the survey was not deposited by the applicants; also because the tract of land was mineral in character, and for that reason not subject to selection.

In 1887, George J. Roskruge, County Surveyor of Pima County, Arizona, at the request of David W. Bouldin, Sr., made a survey of Tract 2, the 1866 location. He ran his lines from the Hacienda de Santa Rita, the commencing point of the 1866 location, and thence ran his lines in accordance with the courses and distances set forth in the 1866 description. At each

corner of the tract so surveyed, he erected a large monument, and on each side line he also erected monuments, so as to mark the boundaries distinctly on the ground.

He filed a copy of the plat in his office as County Surveyor, in 1887. A copy of the topographic map of the survey was also filed with the Surveyor General of Arizona.

In July, 1893, the Board of Supervisors of Pima County adopted an official map of Pima County being a map made by Roskruge, who was still County Surveyor, and on this map Tract 2, being the amended Baca location of 1866, was platted and designated as **“Baca Float No. 3,”** as will be seen from the map of Pima County, Defendants’ Wise Exhibit 3, which is sent up with the record in this case. (Testimony of Roskruge, Tr. p. 233-248.)

So that in 1887, Tract 2, the 1866 location, was surveyed and monumented on the ground so that its boundaries could be readily traced. A plat of the survey was filed in the office of the United States Surveyor General of Arizona, in which the tract was also designated, “Baca Float No. 3,” and the tract was delineated on the official map of Pima County and thereon designated and named, “Baca Float No. 3.”

The Title to Only an Undivided 18-19 Interest in the Tract Is Involved in This Appeal.

Luis Maria Baca, to whose heirs the tract of land in dispute was granted, died in 1827. He had been married three times. He had 19 children, one of whom Antonio, died leaving a child, before the death of his father, and the other 18 children survived their father.

The heirs of the deceased son, Antonio, by certain mesne conveyance, conveyed their interest in the 1863 location, being an undivided 1-19 interest in the entire tract, to the appellant Joseph E. Wise, and defendant Margaret W. Wise. Neither the plaintiffs, nor defendants (appellees) Bouldins, nor any other party to this suit, claim any part of the 1-19 interest inherited by this son Antonio, or by his heirs; nor do any of them deraign any title under Antonio or his heirs. They deny, however, that this Antonio was a son, or his descendants heirs of the original Baca.

The trial court found and decreed that this Antonio was a son, who died before his father, leaving a son who was his heir, who also died leaving children, and that appellant, Joseph E. Wise, and defendant Margaret W. Wise, by mesne conveyances from the heirs of the deceased son of this Antonio, are the owners of this 1-19 interest, each owning one-half of this 1-19 interest. to-wit, 1-38 interest each, in the entire tract. The correctness of this part of the decree is conceded by appellants in the present appeal. The plaintiffs and

defendants Bouldin have, by separate appeal, appealed from that part of said decree.

But the lower court further decreed that plaintiffs, Watts and Davis, were the owners of the remaining 18-19 interest in the south half, and that the defendants Bouldin were the owners of the remaining 18-19 interest in the north half, of the tract of land in dispute. This part of the decree is assigned by appellants Wise as error.

Therefore, the present brief of appellants Wise is devoted only to the consideration of such facts and law as apply to the title and ownership of the undivided 18-19 interest which the court decreed to be owned by plaintiffs, (appellees), Watts and Davis, and defendants, (appellees), Bouldin; and as to which appellants Wise were decreed to have no title.

Deeds Executed by Heirs of Baca to John S. Watts.

The heirs of Baca, except the son and heirs of the son Antonio, executed three deeds to John S. Watts, wherein they conveyed to him the Location No. 3 by the specific description set forth in the 1863 selection, being Tract 1, on our diagram.

The first two deeds were each dated May 1, 1864. Therein certain heirs of Baca, who collectively owned 13-19 interest in the entire tract, conveyed all their right, title and interest to John S. Watts. (Plaintiffs' Exhibits C and D, Tr. pp. 163-164).

The third deed was dated May 30, 1871. In this deed all the heirs of Baca, except the son and heirs of the son Antonio did "relinquish and quitclaim to said John S. Watts all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described." (Plaintiffs' Exhibit O, Tr. p. 197.) Under this deed John S. Watts acquired a further 5-19 interest in said tract of land, making a total of 18-19 interest which he so acquired.

No other deeds were executed by any of the heirs of Baca to John S. Watts.

It was under these deeds that John S. Watts became vested with an undivided 18-19 interest in the tract of land described in the 1863 location.

The Cornelius C. Watts who is one of the plaintiffs herein, is no kin of said John S. Watts.

**Deed from John S. Watts to Christopher E. Hawley,
of Date January 8, 1870.**

After the heirs of Baca had executed to John S. Watts the first two deeds above mentioned, each of date May 1, 1864, under which Watts became vested with title to an undivided 13-19 interest in the tract of land described in the 1863 location, Tract 1 on our diagram; and after John S. Watts had filed his application of April 30, 1866, to amend the 1863 location by substituting therefor the 1866 location; and after said application had been granted, he executed to Christopher E. Hawley, of Binghamton, New York, a deed of remise, release and quitclaim, of date the 8th day of

January, 1870, wherein he remised, released and quit-claimed to Hawley the tract of land described in the 1866 location, describing the same as being situate in the Santa Rita mountains, Arizona, and being bounded and described as follows: "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence," etc., being the identical description of the tract of land as set forth in his 1866 selection, and being Tract 2 on our diagram. This deed is Plaintiffs' Exhibit N, Tr. pp. 193-196.

It was after the execution of this quitclaim deed by Watts to Hawley, to-wit, on May 30, 1871, that the heirs of Baca, excepting the son Antonio and his heirs, executed to Watts the third deed heretofore mentioned, wherein they relinquished and quitclaimed to Watts all their interest in the tract described in the prior deeds of May 30, 1864. John S. Watts acquired, as before stated, under this third deed from the Baca heirs, an additional 5-19 interest in the tract described in the 1863 location; being acquired after he had deeded to Hawley.

The lower court held that this after-acquired title or interest inured to Hawley, grantee under the quitclaim from John S. Watts; and the court further held that this quitclaim deed to Hawley vested him with the full 18-19 interest in the tract described in the 1863 location, Tract 1 on our diagram, although the deed itself only purports to quitclaim the tract described in the 1866 location, Tract 2 on our diagram. This is assigned as error.

In 1873 John S. Watts left the Territory of New Mexico and made his home in Bloomington, Indiana, where, in the year 1876, he died. He left a widow, two sons and three daughters. Prior to his death he executed no deed, other than the deed to Hawley, purporting to convey any interest in either the 1863 or 1866 selection of Baca Float No. 3. Therefore, upon his death, his widow and children inherited the tract of land described in the 1863 location, which during his lifetime he had not quitclaimed or conveyed to anyone.

The plaintiffs (appellees) Watts and Davis, and defendants (appellees) Bouldin, deraign their title under certain mesne conveyances from Christopher E. Hawley, each of which deeds describes the lands therein conveyed by the specific description of the 1866 location.

Appellant Joseph E. Wise, defendant Santa Cruz Development Company, and Interveners, deraign their respective interests in the said undivided 18-19 interest, under mesne conveyances from the widow and heirs of John S. Watts, each of which deeds describes the lands therein conveyed by the specific description of the 1863 location.

**Deeds Under Which Plaintiffs, Cornelius C. Watts
and Dabney C. T. Davis, Jr., and Defendants
Bouldin Deraign Their Title Under John S. Watts.**

The deeds under which plaintiffs and defendants Bouldin deraign their title under John S. Watts, are as follows:

I

John S. Watts
to
Christopher E. Hawley

Quitclaim deed dated January 8, 1870. Quitclaims the tract described in 1866 location.
Plaintiffs' Exhibit N, Tr. pp. 193-196.

II

Christopher E. Hawley
by James Eldredge,
attorney in fact,
to
John C. Robinson

Deed dated May 5, 1884. Conveys tract described in the 1866 location.
Plaintiffs' Exhibit T, Tr. p. 208.

III

Powhatan W. Bouldin
and wife, and James
E. Bouldin
to
John C. Robinson

Deed dated November 12, 1892. Conveys south half of tract described in 1866 location.
Plaintiffs' Exhibit X, Tr. p. 216.

IV

John W. Cameron
to
John C. Robinson

Declaration of Trust, dated November 28, 1892. Recites that he will hold the property about to be conveyed to him by John C. Robinson, in trust, and that when he makes sale thereof, he will divide the proceeds in certain proportions, to John C. Robinson, Mrs. A. T. Belknap, James Eldredge, Charles A. Eldredge and himself.
Plaintiffs' Exhibit DD, Tr. p. 226.

V

John C. Robinson
to
Powhatan W. Bouldin
and James E. Bouldin

Deed dated December 19, 1892. Conveys north half of the tract described in the 1866 location.

Wise Exhibit 38, Tr. p. 400.

VI

John C. Robinson
to
John W. Cameron

Deed dated December 1, 1892. Conveys south half of the tract described in the 1866 location; being the property referred to in the Declaration of Trust, IV.

Wise Exhibit 8, Tr. p. 255.

VII

John C. Robinson
to
Alex F. Mathews

Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews and conveys his interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust.

Plaintiffs' Exhibit U, Tr. p. 210.

John W. Cameron and
Mrs. A. T. Belknap
to
Alexander F. Mathews

VIII

Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys their interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust.

Plaintiff's Exhibit Z, Tr. p. 221.

James Eldredge
to
Alexander F. Mathews

IX

Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys his interest as cestui qui trust in south half of 1866 location under Cameron's declaration of trust.

Plaintiffs' Exhibit CC, Tr. p. 226.

Charles Eldredge
to
Alexander F. Mathews

X

Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys his interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust.

Plaintiffs' Exhibit BB, Tr. p. 224.

XI

John W. Cameron to Alexander F. Mathews	Deed dated September 25, 1893. Conveys south half of the tract described in the 1866 location. Plaintiffs' Exhibit AA, Tr. p. 223.
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XII

Powhatan W. Bouldin and wife, and James E. Bouldin to Alexander F. Mathews	Deed dated February 7, 1894. Convey their interest in south half of the tract described in the 1866 location. Plaintiffs' Exhibit EE, Tr. p. 229.
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XIII

John Ireland and Wilbur H. King to Alexander F. Mathews	Deed dated February 23, 1894. Convey all their interest in south half of the tract described in the 1866 location. Plaintiffs' Exhibit Y, Tr. p. 219.
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XIV

John C. Roobinson to Samuel A. M. Syme	Deed dated April 30, 1896. Conveys north half of the tract described in the 1866 location. Plaintiffs' Exhibit V, Tr. p. 213.
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Alexander F. Mathews Died December 10, 1906, Leaving a Widow, Laura G. Mathews, and the Following Children: Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews and Henry M. Mathews, Tr. pp. 149-150.

Samuel A. M. Syme and
 Laura G. Mathews, the
 widow, and the above
 four children, heirs of
 Alexander F. Mathews,
 deceased and Mason
 Mathews, Charles G.
 Mathews and Henry A.
 Mathews, as executors
 of the will of Alexan-
 der F. Mathews, de-
 ceased,

to

C. C. Watts and D. C.
 T. Davis, Jr., trustees,
 (the plaintiffs in this
 case)

Deed dated February 8, 1907.
 Convey all their right, title and
 interest in Baca Float No. 3,
 described by the 1863 location.
 Plaintiffs' Exhibit W, Tr.
 p. 214.

The court decreed that plaintiffs, under the foregoing
 deeds, were the owners in fee of an undivided 18-19
 interest in the south half, and defendants Bouldin were
 the owners in fee of an undivided 18-19 interest in the
 north half of the tract described in the 1863 location.
 This part of the decree is assigned as error.

**Abstract of Deeds, Etc., Under Which Joseph E. Wise,
 Santa Cruz Development Company and Inter-
 venors Deraign Their Title.**

The deeds and records under which appellant, Joseph
 E. Wise, defendant Santa Cruz Development Company,
 and the Interveners, deraign their title to the 18-19
 interest, aforesaid, are as follows:

I

John S. Watts having died intestate in 1876, his widow Elizabeth A. Watts, his two sons John Watts and J. Howe Watts, and his three daughters, Mary A. Wardwell, Louise Wardwell and Frances A. Bancroft, inherited his interest. Appellant, Joseph E. Wise, de-rains his interest under said heirs, under the following deeds and records:

II

John Watts (son), and
Elizabeth A. Watts
(widow), J. Howe
Watts (son), Mary
A. Wardwell, Louise
Wardwell and Frances
A. Bancroft (daugh-
ters), by John Watts,
their attorney in fact,
to

David W. Bouldin

Note: This David W. Bouldin was the grandfather of the David W. Bouldin who is one of the defendants (appellees) in this action. Tr. p. 148.

Deed dated September 30, 1884. Convey an undivided 2-3 of all their right, title and interest in the tract described in the 1863 location.

Defendants Wise Exhibit 16,
Tr. p. 272.

III

David W. Bouldin
to
John Ireland and Wil-
bur H. King

Deed dated February 24, 1885. Conveys undivided 1-9 interest of all his right, title and interest in the tract described in the 1863 location.

Defendants Wise Exhibit 18,
Tr. p. 312.

IV

Judicial sale of all the interest of David W. Bouldin. Attachment lien, March 14, 1893. Judgment foreclosing same, May 2, 1895. In suit of John Ireland and Wilbur H. King vs. David W. Bouldin, in District Court of the First Judicial District of the Territory of Arizona, in and for Pima County. Judicial sale, under said judgment, July 31, 1895.

In this suit, brought by Ireland and King against David W. Bouldin, on March 13, 1893, to recover some \$5,000 with interest, a writ of attachment was levied on the interest of David W. Bouldin in the tract described in the 1863 location. Bouldin appeared in the action; thereafter he died and Leo Goldschmidt, administrator of his estate, was substituted as defendant; thereafter and on May 2, 1895, judgment was rendered in favor of Ireland and King for \$8,550, the attachment lien was foreclosed, the property ordered sold, and the clerk directed to issue an order of sale to the sheriff directing him to sell the same. Order of sale was duly issued; notice of sale given, as required by law, and on July 31, 1895, all the interest which David W. Bouldin had on March 14, 1893, in the tract described in the 1863 location, was sold by the sheriff, to Wilbur H. King, for \$2,000, and sheriff's Certificate of Sale was duly issued to him therefor. Defendants Wise Exhibit 19, Tr. p. 456.

No redemption from the sale was made.

V

David W. Bouldin,
by Lyman Wakefield,
Sheriff of Pima
County,

to
Wilbur H. King

Sheriff's deed, dated January
16, 1899. Executed under the
above mentioned judgment
and sale.

Defendants Wise Exhibit 23,
Tr. p. 319.

VI

Mrs. A. M. Ireland,
widow of John Ireland,
to
Joseph E. Wise

Deed dated April 24, 1907.
Conveys all her interest in
tract described in the 1863 lo-
cation.

Defendants Wise Exhibit
25, Tr. p. 323.

Note: John Ireland died March 15, 1896, leaving a widow, Mrs. A. M. Ireland, and certain children and grandchildren, who are the "Intervenors" in this case. It was stipulated that the interest acquired by John Ireland was community property, which upon his death was vested one-half in his widow and one-half in "Intervenors," his heirs. Tr. p. 150.

VII

Wilbur H. King
to
Joseph E. Wise

Deed dated April 24, 1907.
Conveys all his right, title and
interest in the tract described
in the 1863 location, and all
interest acquired by him under
the sheriff's sale aforesaid.

Defendants Wise Exhibit
24, Tr. p. 320.

VIII

David W. Bouldin, by
John Nelson, Sheriff
of Pima County,
to
Joseph E. Wise

Deed dated October 5, 1914.
Conveys all the interest which
David W. Bouldin had in tract
described in the 1863 location,
on March 14, 1893, and sold
under decree foreclosing at-
tachment lien of that date,
to Wilbur H. King, and by
King sold to Joseph E. Wise.
Defendants Wise Exhibit
26, Tr. p. 323.

This deed recites the order of the Superior Court, successor of the territorial district court, directing the Sheriff to execute a new deed to Wise, as assignee of King, to cure certain defects in the deed executed by Wakefield. Sheriff to King, *supra* V.

Deeds Under Which the Santa Cruz Development Com- pany Deraigns Title

As heretofore shown, the widow and heirs of John S. Watts, deceased, on September 30, 1884, conveyed an undivided 2-3 of all their right, title and interest in Tract 1, to David W. Bouldin, Sr. Thereafter they conveyed to James W. Vroom their remaining 1-3 interest by the following deeds:

I

John Watts and other
heirs of John S. Watts
to
James W. Vroom

Deed dated October 25, 1899.
Conveys an interest in the
tract described in the 1863 lo-
cation. Deed not in evidence,
but testified to by John Watts.

II

J. Howe Watts and
other heirs of John S.
Watts

to
John Watts

Deed dated October 25, 1899.
Conveys their interest in the
tract described in the 1863 lo-
cation.

Defendant Santa Cruz De-
velopment Company Ex-
hibit 5.

III

John Watts and wife
to
James W. Vroom

Deed dated February 3, 1913.
Conveys tract described in the
1863 location.

Defendant Santa Cruz De-
velopment Company ex-
hibit 6.

IV

James W. Vroom and
wife
to
Santa Cruz Develop-
ment Company

Deed dated February 3, 1913.
Convey tract described in the
1863 location.

Santa Cruz Development
Company Exhibit 7.

Title of the Intervenors.

It will be remembered that David W. Bouldin, by deed dated February 21, 1885, conveyed to John Ireland and Wilbur H. King a 1-9 of the interest which he, Bouldin, had acquired under the deed from the Watts heirs to him of date September 30, 1884.

John Ireland died March 15, 1896, leaving surviving him as heirs and devisees, a widow, Mrs. A. M. Ireland, and certain children and grandchildren. Said children

and grandchildren are called Intervenors. It was stipulated in this case that the widow, Mrs. A. M. Ireland, was the owner of an undivided one-half interest, and the Intervenors of the remaining undivided one-half interest of the title acquired by John Ireland in his lifetime. Tr. p. 150. Mrs. Ireland conveyed her interest to Joseph E. Wise, by deed heretofore referred to; the remaining one-half of the interest of John Ireland belongs to the Intervenors.

The court should have decreed that Joseph E. Wise, in addition to the said 1-38 interest adjudged to him by said decree, was also the owner of a further interest in the whole tract, as hereinafter tabulated and set forth, and the failure of the court so to decree is also assigned as error. Defendants Wise Assignment of Error XXI.

During the trial the court admitted in evidence, subject to the objections of plaintiffs, a duly authenticated copy of the record of a deed executed September 30, 1884, by John Watts and the other heirs and widow of John S. Watts, deceased, to David W. Bouldin, conveying to him an undivided 2-3 interest in Tract 1, the 1863 location, and said instrument was filed as part of the record in the case, marked Defendants Wise Exhibit 16, and also Defendants Wise Exhibit 17, being the deed hereinbefore referred to. Thereafter, and after the court had decided that all the interest acquired by John S. Watts from the heirs of Baca was conveyed by him to Hawley, under his deed to Hawley of 1870, the court sustained the objection of plaintiffs to said deed of 1884, to which ruling appellants Wise excepted. This ruling

of the court is assigned as error. Defendants Wise Assignments of Error V, VI and VII.

Upon the trial the court also admitted in evidence, subject to the objection of plaintiffs and defendants Bouldin, a duly authenticated copy of the judgment, record and proceedings in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, hereinbefore referred to, being Defendants Wise Exhibit 19.

Thereafter, and after the court had decided that all the interest acquired by John S. Watts from the heirs of Baca was conveyed by him to Hawley, under his deed to Hawley of 1870, the court sustained the objection of plaintiffs to said documents, Defendants Wise Exhibit 19, to which ruling appellants Wise excepted. This ruling is assigned as error. Defendants Wise Assignment of Error VIII.

The 160-Acre Tract Claimed by Wise by Virtue of the Statute of Limitation.

Appellant, Joseph E. Wise, testified that for more than ten years prior to April, 1907, the date of the first deed to him from an owner of the grant, he had been in peaceful adverse possession of the following 160-acre tract of land, situate within the limits of the 1863 location, to-wit: The east half of the northwest one-fourth and the west half of the northeast one-fourth of section 35, township 22 south, of range 13 east; that he fenced up said tract in 1899, and had been in adverse and peaceful possession thereof continuously for a period of more than ten years prior to April, 1907, and that he

claimed the ownership of all of said 160 acres by virtue of adverse possession for ten years prior to April, 1907. On motion of plaintiffs this testimony was stricken out by the court, on the ground that it was immaterial; that no title could be acquired to any of said tract, under the statute of limitations of Arizona, until after the land had been segregated from the public domain; that the tract was not so segregated until the map and survey of Philip Contzen was approved and filed by the Secretary of the Interior in December, 1914; to which ruling Joseph E. Wise excepted, and this ruling is also assigned as error. Defendants Wise Assignments of Error IX and XX.

For the same reason the testimony of Lucia J. Wise, that since 1900 her mother, Mrs. Mary E. Sykes, had been in adverse and peaceful possession of a certain 40-acre tract within the limits of said Baca Float No. 3, and described in paragraph 36 of the amended answer of defendants Joseph E. and Lucia J. Wise, cultivating and using the same for a continuous period of more than ten years thereafter, and until her death, in 1913, and that her daughter, defendant Mrs. Lucia J. Wise, as executrix, had been in possession thereof since her mother's death, was also stricken out by the court on motion of plaintiffs, to which ruling defendants Wise excepted. This also is assigned as error. Defendants Wise Assignment of Error X.

During the trial the court permitted the defendants Bouldin to introduce in evidence the following deeds and instruments, to-wit:

1. Deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldins' Exhibit 1.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894, being Defendants Bouldins' Exhibit 2.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendant Bouldins' Exhibit 3.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendant Bouldins' Exhibit 4.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendant Bouldins' Exhibit 5.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracy, dated April 16, 1900, being Defendant Bouldins' Exhibit 6.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendant Bouldins' Exhibit 7.

Defendants Wise objected to the introduction of each thereof, on the ground that the same was immaterial, and did not purport to convey the property in controversy; for the further reason that none of the grantors or parties mentioned in said deeds and certificate of sale had any interest to convey at the time of the execution

thereof. Said objections were overruled, to which exceptions were taken, and this ruling is also assigned as error. Defendants Wise Assignment of Error XII.

During the trial the court permitted the plaintiffs to introduce in evidence an instrument in writing executed by John S. Watts to William Wrightson, dated March 22, 1863, being Plaintiffs' Exhibit L, wherein said Watts purported to sell to said William Wrightson one of the unlocated Baca tracts, and "to make a full and complete title in fee simple for said land to said Wrightson, his heirs or legal representatives, whenever thereunto required." Defendants Wise objected to the introduction thereof in evidence, for the reason and upon the grounds that plaintiffs deraigned no title under said instrument; that there was no evidence showing that Christopher E. Hawley claimed or deraigned any interest or title under said instrument, and further that the same could not be used to vary the description in the deed subsequently executed by John S. Watts to Christopher E. Hawley.

Said objection was overruled and exception taken, and this also is assigned as error. Defendants Wise Assignment of Error XIII.

The Injunction Against Joseph E. Wise

While this suit was pending, and before the trial thereof, upon the application of plaintiffs, the court caused a writ of injunction to issue restraining the defendant Joseph E. Wise, pending the action,

“from erecting and re-erecting fences in, upon or around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs or their tenants from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of the cattle of said plaintiffs or their tenants to and from the watering or drinking places upon said Float, or prevent or obstruct the use of said water and land as heretofore used.”

In the decree in this case this writ of injunction is made perpetual. This part of the decree is also assigned as error, for the reason that this is a suit to quiet title, and not a suit to restrain trespass; there is no issue raised in the pleadings as to possession, or right of possession, and there is no evidence in the case that Wise was doing, or threatening to do, any of the matters or things, which the court has enjoined him from doing. And further, that as said defendant Joseph E. Wise has been decreed to be a tenant in common with the plaintiffs, as to the south half of the tract of land aforesaid, it was error for the court by its decree to perpetually enjoin him from the exercise of his rights as a tenant in common with plaintiffs. Defendants Wise Assignment of Error XXIII.

Title to the Overlap

The tract of land described in the 1866 location, with the beginning point at the Hacienda de Santa Rita, includes within its limits a portion of the tract of land described in the 1863 location, as shown on the diagram in this brief, and more accurately shown on the map of

the two locations, Defendants Wise Exhibit 34, Tr. p. 379, and the original exhibit itself. This area, common to the two locations, we call "the overlap;" it contains about 6,000 acres.

We concede that a conveyance of Tract 2, according to the description of the 1866 location, is a good conveyance for that portion of Tract 1, the 1863 location, so situate within the limits of Tract 2, which we call the overlap.

Therefore on January 8, 1870, when John S. Watts executed to Christopher E. Hawley his quitclaim deed, quitclaiming to him the tract described in the 1866 location, this deed did vest in Hawley all of the interest which John S. Watts then owned in the overlap.

We concede that all deeds under which plaintiffs deraign their title are good conveyances of the interest in said overlap, so conveyed by John S. Watts to Christopher E. Hawley, and that the plaintiffs, as the owners of the southern half of the tract of land described in the 1866 location, are the owners of an undivided interest in said overlap, and no more.

The remaining undivided interest in the overlap, as well as the 18-19 interest in the remaining part of the 1863 location, outside of the overlap, is, as we contend, owned by Joseph E. Wise, Santa Cruz Development Company, and Intervenors, in the proportions hereinafter set forth in this brief; and the court should have so decreed. The failure of the lower court so to decree is assigned as error.

SPECIFICATION AND ASSIGNMENT OF ERRORS.

I

The court erred in adjudging and decreeing that the plaintiffs Cornelius C. Watts and Dabney C. T. Davis, Jr., were at the commencement of this action and still are vested with absolute title in fee simple to an undivided eighteen-nineteenths (18-19) interest in the south half (1-2) of the tract or parcel of land in said judgment and decree described, and in quieting their title thereto; and said judgment and decree in that regard is contrary to the evidence in this case.

II

The court erred in adjudging and decreeing that the absolute title in fee simple to the north half of that certain tract or parcel of land described in said judgment and decree was at the time of the commencement of this action, and still is, vested to the extent of an undivided 18-38 interest in Jennie N. Bouldin; an 18-76 interest in David W. Bouldin, and an 18-76 interest in Helen Lee Bouldin, and in adjudging that any of said Bouldins had any interest whatsoever in said tract of land or any part thereof, and in quieting their title thereto; and said judgment and decree in that regard is contrary to the evidence in this case.

III

The court erred in adjudging and decreeing that the absolute title in fee simple was, at the commencement of this action, and still is, vested to the extent of an 18-19 interest in plaintiffs as to the south half, and 18-

19 interest in said Bouldins as to the north half, of the lands and premises described in the judgment and decree herein, and in quieting their respective titles thereto, for the reason that the evidence in this case conclusively shows and proves that plaintiffs and said defendants Bouldin claim and deraign whatever title they have under and by virtue of mesne conveyances from Christopher E. Hawley, and that the said Christopher E. Hawley deraigns his title thereto under that certain quitclaim deed of date January 8, 1870, executed by John S. Watts to said Hawley, as aforesaid; and that the said John S. Watts did not, at the date of his deed aforesaid, to said Hawley, own in fee simple or otherwise, an undivided 18-19 interest in the tract or parcel of land described in said judgment and decree, and therefore, the said Christopher E. Hawley did not acquire under the said quitclaim deed from John S. Watts, or in any other manner, or by any other deed, an undivided 18-19 interest in the said tract of land described in the decree, or an 18-19 interest in or to any part thereof.

IV

The court erred in overruling the objection of the defendants Joseph E. Wise and Lucia J. Wise to the offer and introduction by the plaintiffs of the deed executed to John S. Watts, by certain heirs of Luis Maria Baca, insofar as said deed pretended to be executed or to be a deed of conveyance of the following heirs of said Luis Maria Baca, to-wit: (1) Felipe Baca, (2) Domingo Baca, (3) Jesus Baca y Lucero 1st, (4) Jesus Baca y Lucero 2nd, (5) Josefa Baca y Sanchez.

V

The court erred, after it had admitted in evidence, subject to the objection of plaintiffs, a deed executed by John Watts, in his own proper person and as the attorney in fact for his brother, J. Howe Watts, and the other grantors, dated September 30, 1884, "Defendants Wise Exhibit 16" and "Defendants Wise Exhibit 17," in sustaining the said objection.

VI

The court erred in sustaining the objections of counsel for plaintiffs to the introduction in evidence by the defendant Joseph E. Wise of a duly authenticated copy of the record of a deed dated September 30th, 1884, executed by John Watts in his own proper person, and by Elizabeth A. Watts and other heirs of John S. Watts, deceased, by said John Watts as their attorney in fact, wherein they did convey unto said Bouldin an undivided two-thirds interest of all their interest in the tract of land described in the decree. Defendants Joseph E. Wise Exhibit "16" and "17."

VII

The court erred in not permitting the said Joseph E. Wise to introduce in evidence the said deed, or duly certified copies of the record of the said deed, executed by the heirs and widow of John S. Watts to David W. Bouldin.

VIII

The court erred in sustaining the objection of plain-

tiffs and defendants Bouldin to the introduction in evidence by the defendant Joseph E. Wise of a duly authenticated copy of the judgment, record and proceedings in that certain case or suit in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, entitled John Ireland and Wilbur H. King, plaintiffs, vs. David W. Bouldin, defendant, and thereafter being in the Superior Court of the State of Arizona, in and for the County of Pima, as successor of the said District Court, "Defendants Wise Exhibit 19," which said judgment in said case, amongst other things, adjudged and decreed the foreclosure of an attachment lien upon, and directed the sale of, all the right, title and interest which said David W. Bouldin had on the 14th day of March, 1893, in the tract or parcel of land in dispute in the present action, and which said record and proceedings further showed that in pursuance of said judgment, the Sheriff of said Pima County did duly sell all of the right, title and interest which the said David W. Bouldin had in said tract of land aforesaid, to Wilbur H. King; that no redemption was made from said sale; that thereafter, the said sale was duly confirmed and a deed directed to be executed by the court having jurisdiction in said case, to Joseph E. Wise, as the successor in interest and grantee of said Wilbur H. King.

Counsel for defendants Bouldin also objected to the introduction in evidence by Joseph E. Wise, of the said judgment, record and proceedings, on the ground that the court rendering said judgment had no jurisdiction,

and that the judgment was void, that the levy was void, and that the confirmation of the sale was void, and generally, that no right, title or interest was conveyed under the sale made by said sheriff, or under the deed executed under any order of the court, or by any sheriff, or other officer. These objections were also sustained by the court, and the defendant Joseph E. Wise also assigns as error said ruling of the court so sustaining said objections of counsel for defendants Bouldin, for the reason that the court rendering said judgment had jurisdiction and the title conveyed by the sheriff was a good title, and the said judgment, record and proceedings were competent and material evidence, as hereinbefore more fully set forth.

The said record and proceedings were admitted in evidence subject to the objections of plaintiffs and defendants Bouldin, and thereafter, and after defendant Joseph E. Wise had rested his case, the court sustained the objections of plaintiffs and defendants Bouldin to the introduction of the evidence of said record, proceedings and judgment, to which ruling of the court due exception was taken.

IX

The court erred in sustaining the motion of plaintiffs to strike out all of the testimony of the defendant Joseph E. Wise as to his possession of any part of the tract or parcel of land in dispute, and particularly his testimony as to his adverse possession, and claim under adverse possession and prescription, to the following piece of land situate within the limits of the tract or parcel of

land described in the decree, to-wit: the east half (1-2) of the northwest quarter (1-4) and the west half (1-2) of the northeast quarter (1-4) of section thirty-five (35), township twenty-two (22) south, range 13 east, Gila and Salt River meridian, containing one hundred and sixty (160) acres.

X

The court erred in sustaining the motion of the plaintiffs and of the defendants Bouldin, to strike out the testimony, and admissions as to the testimony, of the defendant Lucia J. Wise, the grounds of said motion being that said evidence was immaterial and that no title or rights by adverse possession alone could be obtained as against any of the parties hereto as to the tract of land aforesaid, until December, 1914.

XI

This assignment of error is not urged.

XII

The court erred in overruling the objection of counsel for Joseph E. Wise and Lucia J. Wise, to the introduction in evidence by the defendants Bouldin, of each and all of the following deeds and instruments in writing, to-wit:

1. Deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldins' Exhibit 1.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894,

being Defendants Bouldins' Exhibit 2.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendants Bouldins' Exhibit 3.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendants Bouldins' Exhibit 4.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendants Bouldins' Exhibit 5.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracy, dated April 16, 1900, being Defendants Bouldins' Exhibit 6.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendants Bouldins' Exhibit 7.

The introduction of which said deeds was objected to on the ground that the same were immaterial and did not cover the property in controversy, for the reason that none of said grantors or parties mentioned in the said deeds and certificate of sale had any interest whatsoever in the tract or parcel of land described in the decree, and none of said deeds or said certificate of sale purported to convey the property in controversy, or the tract of land described in the decree, or any interest therein.

XIII

The court erred in permitting the plaintiffs to introduce in evidence, over the objections of the defendants Wise and Santa Cruz Development Company, an instrument in writing executed by John S. Watts to Wm. Wrightson, dated March 2, 1863, and being Plaintiffs' Exhibit L, for the reason that the same was irrelevant, incompetent and immaterial; that plaintiffs deraign no title under said instrument; and the said instrument could not be used to vary the description in the deed subsequently executed by said John S. Watts to Christopher E. Hawley; and there was no evidence showing that Christopher E. Hawley claimed or deraigned any interest or title under the said title bond aforesaid.

(Assignments of Error XIV, XV, XVI, XVII, XVIII and XIX are only applicable to the 1-19 interest inherited by the heirs of the son, Antonio Baca, and will be set forth and considered in our brief as to that 1-19 interest.)

XX

The court erred in adjudging and decreeing that until the tract or parcel of land described in said judgment and decree was segregated from the public domain of the United States, on or about the 14th day of December, 1914, no adverse possession or statutory prescription could commence to be initiated by any party to the action.

XXI

The court erred in adjudging and decreeing that the

defendant Joseph E. Wise was vested with an absolute fee simple title to no greater interest than an undivided 1-38 interest in the tract or parcel of land described in the decree; and in not adjudging and decreeing that there was vested in said Joseph E. Wise, in addition to the said 1-38 interest mentioned in said decree, a further interest, equal to 2-3 of an undivided 18-19 interest in the said tract or parcel of land, and in not quieting his title thereto.

XXII

The court erred in rendering its judgment and decree that the various recorded instruments, purporting to inure to the benefit of the said plaintiffs, or to the benefit of the said defendants Bouldin, or purporting to be in hostility to the title adjudicated in said decree in favor of the said plaintiffs, and of the said defendants Bouldin, or any or either of them, be removed as clouds; and in removing the same as clouds upon the title adjudicated to said plaintiffs, and to the said defendants Bouldin, and to each of them.

XXIII

That the court erred in said judgment and decree in ordering and adjudging "that the temporary injunction heretofore granted against Joseph E. Wise, as modified, be made permanent as to the south half of the tract or parcel of land in said judgment and decree described;" the said injunction as modified and so made permanent by said decree, enjoins and restrains the said Joseph E. Wise "from erecting and re-erecting fences in, upon or

around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs or their tenants from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of the cattle of said plaintiffs, or their tenants, to and from the water or drinking places upon said Float, or prevent or obstruct the use of said water and land as heretofore used,, etc.”

XXIV

Each and all of the errors hereinabove assigned by the said defendant Joseph E. Wise as errors affecting him and his interests and his rights, also equally affect the interests and rights of the defendants, Intervenors, M. I. Carpenter, Patrick C. Ireland, Ireland Graves. Anna R. Wilcox and Eldredge I. Hurt, heirs of John Ireland, deceased. These defendants do now further assign as error each and all of the above assignments of error, as errors also affecting the said defendants.

ARGUMENT.

Assignment of Error I.

The Court erred in decreeing plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., to be vested with absolute title in fee to an undivided 18-19 interest in the south half of the tract of land in the decree described, and in quieting their title thereto.

As the plaintiffs alleged in their complaint that they are the owners of the tract of land in dispute in this action, and as this allegation is denied by the defendants, it was incumbent upon them to prove it.

It is well established that in an action to quiet title plaintiff must prove his title, and if he fails, is not entitled to a decree, no matter how weak or void may be the title of the defendants.

“The burden is on plaintiff to establish that he himself has a perfect, legal or equitable title, without reference to and regardless of whether defendant’s title be valid or invalid.”

32 Cyc., 1369.

“The rule in ejectment is that plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief.”

Dick vs. Foraker, 155 U. S., 404-416; 39 L. Ed., 201-206.

In the case of Frost vs. Spitley, 121 U. S. 552; 30 L. Ed., 1010, the court said:

“Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon a title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.”

Citing many other decisions of the U. S. Supreme Court.

Therefore, no matter how weak or invalid may be the asserted titles of the defendant, or any of them, if the plaintiffs in this case did not themselves have title to an undivided 18-19 interest in the south half of the tract of land in dispute, the decree is erroneous.

We will now show that plaintiffs did not own an undivided 18-19 interest in the south half of the tract of land in controversy.

The immediate deed under which plaintiffs claim their title to the lands described in the decree, is a deed executed to them by Samuel A. M. Syme, Laura G. Mathews, and other devisees and executors of the will of Alexander F. Mathews, of date February 8, 1907, being Plaintiff's Exhibit W, Tr. p. 214. If Syme and the heirs, devisees and executors of Alexander F. Mathews, did own the lands which they purported to

convey by the above deed, the deed is sufficient in form to have conveyed those lands.

But neither Syme, nor the heirs, devisees and executors of Mathews, were the owners of the lands which they so purported and attempted to convey.

In our statement of the facts of the case in this brief, we have said that, as to the piece of land we call "the overlap," being that portion of the tract described in the 1866 location, which overlaps the tract described in the 1863 location, the plaintiffs did have an undivided interest.

Hereafter, when we state that plaintiffs, or their grantors, had no interest whatsoever in any part of the tract described in the 1863 location, being the lands described in the decree, a reservation is to be understood as to their undivided interest in the overlap, as to which we concede their title; the amount of that interest will be hereafter shown.

Deed from Syme and Devisees, Etc., of Alexander F. Mathews, to Plaintiffs, Dated October 8, 1907, Plaintiffs' Exhibit W, Tr. p. 214.

In this deed Syme and the devisees, etc., of Mathews, purport to convey to the grantees, plaintiffs herein, the tract described in the 1863 location.

Deed from John C. Robinson to Samuel A. M. Syme, Dated April 30, 1896, Plaintiffs' Exhibit V, Tr. p. 213.

The only deed executed to Samuel A. Syme purporting to convey to him any interest in Baca Float No. 3, was a deed executed to him by John C. Robinson, April 30th, 1896, conveying to him the north half of the tract described in the 1866 location.

It is under this deed that Symes derails his title. In this deed Robinson, the grantor, quitclaims and conveys to Symes a tract of land with the following description:

“all his right, title and interest, both in law and equity, in and to a certain tract or body of land, situate in Pima County, in the Territory of Arizona, containing some fifty thousand (50,000) acres, more or less, and described as follows:

The upper or north one-half of the tract of land of some 100,000 acres, more or less, known as Baca Location or Baca Float No. 3, bounded as follows: Beginning at a point 6 miles 18 chains and 22 links, north of a point 3 miles west by south from the building known as the Hacienda de Santa Rita; thence from said beginning point north 6 miles 18 chains and 22 links; thence east 12 miles 36 chains and 14 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles 36 chains and 44 links, to the place of beginning.” Tr. p.

Prior Deed from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin, Dated November 19, 1892, Recorded December 27, 1892, Defendants Wise Exhibit 39, Tr. p.

Four years prior to the execution of the foregoing deed by Robinson to Syme, Robinson had executed a

deed conveying the same tract of land to Powhatan W. Bouldin and James E. Bouldin, Defendants Wise Exhibit 8, Tr. p. 255. Therefore, when Robinson executed his deed to Syme, Syme acquired nothing, for Robinson had theretofore conveyed the same land to the Bouldins. The description of the property conveyed by Robinson to Powhatan W. and James E. Bouldin, is as follows:

“does hereby grant, assign, release and confirm to the parties of the second part, their heirs and assigns forever, one-half of the above described premises, bounded and described as follows, to-wit;

Beginning at a point 6 miles, 18 chains and 22 links, north of a point 3 miles west by south from the building known as the Hacienda de Santa Rita; running thence north 6 miles, 18 chains and 22 links; running thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; running thence west 12 miles, 36 chains and 44 lines to the place of beginning. **The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location No. three (3) of the Baca series.”** Tr. p.

So whatever construction is placed upon the description contained in the deed from Robinson to Syme, the same construction must be placed upon the prior deed from Robinson to Powhatan W. and James E. Bouldin. And as the identical tract of land is described in both deeds, Syme acquired no title from Robinson, for Robinson had already conveyed the same, and by the same

description, under a prior recorded deed, to Powhatan W. and James E. Bouldin.

As the lower court did not decree plaintiffs to have any title to the north half of the 1863 location, it is unnecessary further to consider the deed from Syme to plaintiffs, except to say that under that deed plaintiffs acquired no title from said Syme.

The Deeds Under Which the Heirs and Executors of Alexander F. Mathews Deraigned Their Title.

No deed or deeds were executed by anyone to the widow, or heirs, or devisees, or executors, of Alexander F. Mathews. They only acquired, by descent or by will, such title as Alexander F. Mathews himself had at the time of his death.

It was stipulated by all the parties, as a fact, that Alexander F. Mathews was born on or about December, 1836; that he was married in 1866, and died December 10th, 1906, leaving a widow, Laura G. Mathews, and four adult children, to-wit: Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews and Henry Mason Mathews. Tr. p. 149. The widow and children inherited whatever interest Alexander F. Mathews had at the time of his death in 1906; and this was the interest they conveyed to plaintiffs. We will now show that Alexander F. Mathews himself had no interest in the tract described in the 1863 location.

Deeds Executed to Alexander F. Mathews.

Seven deeds were executed to Alexander F. Mathews in his lifetime, and no more, being as follows:

(1) Deed from John C. Robinson to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit U, Tr. p. 210.

(2) Deed from John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit Z, Tr. p. 221.

(3) Deed from John W. Cameron to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit AA, Tr. p. 223.

(4) Deed from James Eldredge to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit CC, Tr. p. 226.

(5) Deed from Charles A. Eldredge to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit DD, Tr. p. 226.

(6) Deed from Powhatan W. Bouldin and wife and James E. Bouldin to Alexander F. Mathews, dated February 7, 1894, Plaintiffs' Exhibit EE, Tr. p. 229.

(7) Deed from John Ireland and Wilbur H. King to Alexander F. Mathews, dated February 23, 1894, Plaintiffs' Exhibit Y, Tr. p. 219.

Before quoting the description of the lands conveyed in each of these seven deeds, it is necessary to explain that prior to the execution thereof, to-wit, on December 1, 1892, the John C. Robinson, above named, had executed a deed to the John W. Cameron, above named,

conveying to him the southern half of the lands described in the 1866 location, Defendants Wise Exhibit 8, Tr. p. 255. In regard to which lands, Cameron, on November 28, 1892, had executed a declaration of trust, Plaintiffs' Exhibit DD, Tr. p. 226, in which, amongst other things, he declared that upon a sale of said lands he would pay the proceeds thereof in certain proportion to John C. Robinson, Mrs. A. T. Belknap, Charles A. Eldredge and James Eldredge, retaining a certain amount for himself.

After the execution by Robinson of the above mentioned deed to Cameron, and the execution of the declaration of trust aforesaid, Cameron, Robinson, Mrs. Belknap and the two Eldredges executed the deeds above tabulated, being deeds 1, 2, 3, 4 and 5, to Alexander F. Mathews, wherein they all conveyed to him their legal and equitable interests in the lands in said deeds described. These five deeds are as follows:

Deed (1) John C. Robinson to Alexander F. Mathews, September 22, 1893, Plaintiffs' Exhibit U, Tr. p. 210.

In this deed, being the first one of the above mentioned deeds executed to Alexander F. Mathews, there is the following recital:

“Whereas, the said John C. Robinson, by deed dated December 1, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron of Washington, D. C., a certain tract of land in said County and Territory, which is described as follows,

viz: That certain tract of land which is the southern half of that tract of land known as Baca Float No. 3, containing 100,000 acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron containing 50,000 acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles thirty-six chains and forty-four links, thence south six miles, eighteen chains and twenty-two links, thence west twelve miles, thirty-six chains and forty-four links, to the beginning, together with all the tenements and appurtenances thereunto belonging; and whereas, by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the fourth (4th) section or paragraph of said declaration of trust, I am entitled to have and recover and to have paid to me by the said Cameron ten (10) per centum of the money to be realized net by said Cameron from the sale of said land when by him sold.”

Then follows in the deed the following conveyance:

“I, the said John C. Robinson, the party of the first part, do hereby grant and convey and assign to the said Alex. F. Mathews, without any recourse upon me whatsoever, all of my right, title and interest in and to said land above described, and to the net proceeds thereof, by virtue of the said declaration or trust or otherwise, and I do hereby authorize the said John W. Cameron to convey and grant the said

above described tract of land of 50,000 in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof, in and under the said declaration of trust, or in any manner, in any way or upon any ground whatever." Tr. p. 210.

Deed (2) John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, Dated September 22, 1893, Plaintiffs' Exhibit Z, Tr. p. 220.

This deed contains the same recital and the same words of conveyance as the deed from Robinson to Mathews above quoted, and need not be repeated.

Deed (4) James Eldredge to Alexander F. Mathews, dated September 22, 1893, and

Deed (5) Charles A. Eldredge to Alexander F. Mathews, dated December 22, 1893, also contain the identical recital and the same words of conveyance, except as to the name of the grantor, as the foregoing deed from Robinson to Mathews, and above quoted, and need not be repeated. Tr. pp. 223-226.

Deed (3) John W. Cameron to Alexander F. Mathews, Dated September 25, 1893.

In pursuance of the foregoing deeds and authorizations, John W. Cameron executed to Alexander F. Mathews, a deed dated September 25, 1893, Plaintiffs' Exhibit AA, Tr. p. 223, wherein he conveyed to

Mathews the south half of the lands described in the 1866 location, the description thereof in the deed being as follows;

“that certain tract of land situated in Pima County, in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains twenty-two links; thence six miles, twelve miles, thirty-six chains and forty-four links to the beginning.” Tr. p. 223.

Deed (6) Powhatan W. Bouldin and Wife and James E. F. Mathews, February 23, 1894, Plaintiffs' Exhibit Exhibit EE, Tr. p. 229.

In this deed Powhatan W. Bouldin and wife and James E. Bouldin convey to Mathews the southern half of the tract described in the 1866 location, by a description identical with that in the foregoing five deeds, the description in their deed being as follows:

“That certain tract of land situated in Pima County, in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres,

more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres, more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains twenty-two links; thence west twelve miles, thirty-six chains and forty-four links, to the beginning." Tr. p. 229.

Deed (7) John Ireland and Wilbur H. King to Alexander F. Mathews, February 2, 1894, Plaintiffs' Exhibit Y, Tr. p. 219.

In this deed, also, the grantors, Ireland and King, convey to Alexander F. Mathews, all their interest in the southern half of the tract described in the 1866 location, by a description identical with that in the foregoing six deeds, the description in the deed being as follows:

"the following described tract or parcel of land in said County and Territory, viz: The southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, which said southern half hereby conveyed, released and quitclaimed contains fifty thousand (50,000) acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thnce south six miles, eighteen chains and

twenty-two links; thence west twelve miles, thirty-six chains and forty-four links to the beginning.”
Tr. p. 219.

It will be seen that the description of the tract of land conveyed to Alexander F. Mathews in each and all of the seven foregoing deeds, and being all of the deeds under which he deraigned any title, is identical. In each of these deeds the respective grantors convey:

“the southern one-half of the tract of land known as Baca Float No. 3, containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz:

Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links——”

Here arises a question of fact which must first be determined before the foregoing description, or the description in any of the seven mentioned deeds, can be intelligently considered, namely—

What tract of land was known as “Baca Float No. 3,” in the years 1893-4, when said deeds to Mathews were executed? Was it Tract 1 on our diagram, the 1863 location; or was it Tract 2, the tract described in the 1866 location?

The answer to this question requires a consideration of the following five facts, to-wit:

1. Alexander F. Mathews himself, the grantee in the

deeds, declared that Baca Float No. 3 was the tract or land described in the 1866 location, Tract 2 on the diagram.

2. In 1887, the tract described in the 1866 location was marked upon the ground, monuments were erected at each corner thereof, and monuments were erected along each side line thereof, so that its boundaries could be readily traced.

3. In 1887, the tract described in the 1866 location was surveyed by George J. Roskruge, the County Surveyor of Pima County, who erected the monuments above mentioned; he made a plat of his survey and filed it as a public record in his office as County Surveyor of Pima County, on which plat the tract is designated "Baca Float No. 3;" he filed a more elaborate map of his survey in the office of the United States Surveyor General of Arizona, about the same time, on which map the tract is designated, "Baca Float No. 3;" and in 1893 the tract so monumented and surveyed, was designated on the official map of Pima County as, "Baca Float No. 3," being the Tract 2 on the diagram.

4. The tract described in the 1866 location was known by the people generally as "Baca Float No. 3," and was the only tract known by that name.

5. The lands within the limits of the 1863 location were not known by the name of "Baca Float No. 3," but were known as the Tumacacori and Calabasas land grants, and the land outside of these grants had no name.

First. Alexander F. Mathews, on March 1, 1903, in the matter of his petition to the Secretary of the Interior, seeking for a rescission of the decision rendered by the Secretary in July, 1899, which held the 1866 location to be invalid, stated in language as clear and strong as words could make it, that the land known as "Baca Float No. 3" was the tract of land described in the 1866 location, Tract 2 on our diagram. In this petition Alexander F. Mathews says:

"From the 21st day of May, 1866, when the Commissioner of the General Land office allowed the amended description, to the 25th day of July, 1899, when the decision complained of was made, no one, within or without the department, ever appears to have questioned the validity of the allowance of the 'amended description.' And the Department itself, in the decision of Secretary Lamar, of date June 15, 1887, held that 'the claimant must be held to this selection and location,' as under amended description. **The land so described was understood to be "Baca Float No. 3."** Tr. p. 394.

Again, Mathews in this petition further says:

"The land described in the 'amended description' was considered by the Government as private land, and passed from grantee to grantee for large considerations, as Baca Float No. 3, and **there was no thought or question that any other portion of the earth was Baca Float No. 3, in law or in fact.**" Tr. p. 394.

Three years after Alexander F. Mathews made this strong and positive declaration as to what particular

tract of land was known by the name of "Baca Float No. 3," he died. There is no evidence that he ever made any other, different or contrary declaration.

But, within a year after his death, his heirs, ignoring the declaration of their ancestor, claimed that "Baca Float No. 3" was not the tract described in the 1866 location, Tract 2 on the diagram, but was the tract of land described in the 1863 location, being Tract 1 on the diagram, and they conveyed the 1863 location to plaintiffs, calling it "Baca Float No. 3."

And plaintiffs are urging this court to find as a fact, that the tract of land known as "Baca Float No. 3," was the tract of land described in the 1863 location, Tract 1 on our diagram, in face of the fact that Alexander F. Mathews himself, under whose heirs plaintiffs deraign their title, declared in his lifetime that the only tract of land known by the name of "Baca Float No. 3" up to July, 1899, when the Secretary of the Interior declared the 1866 location invalid, was the same and identical tract of land described in the 1866 location, Tract 2 on our diagram.

Second. George J. Roskruge testified as a witness in the case, that in the year 1887, and thereafter, he was County Surveyor of Pima County, Arizona; that David W. Bouldin, Sr., employed him to make a survey of "Baca Float No. 3," in the summer of 1887, which he did, and that the survey he made was in accordance with the description of the 1866 location. He went to the place called Hacienda de Santa Rita and commenced his

survey from that beginning point. He saw Morgan R. Wise, father of the appellant, Joseph E. Wise, who was living there at that time. Roskruge ran his lines according to the courses and distances of the 1866 location, erecting monuments as he went along, putting up monuments all along the line, so that they could be seen one from the other, so that if the land was ever fenced, there would be no trouble in fencing it. At each corner he erected large monuments. (Testimony of Roskruge, Tr. pp. 233-248.) This tract of land so surveyed and monumented on the ground, was known and called "Baca Float No. 3," being Tract 2 on our diagram.

Third. Not only was the tract of land described in the 1866 location so monumented and marked on the ground, in the year 1887, but Roskruge further testified that he made a map of this survey, Tr. p. 235 (Defendants Wise Exhibit "1," transmitted with the record in this case). This map, which is an elaborate topographical map of the Roskruge survey, shows the tract according to the 1866 description, and on this map this tract is named "**Baca Float No. 3.**"

Roskruge also filed, as a record in his office of County Surveyor, a more simple plat of his survey, a copy of which plat is set forth in the transcript as Defendants Wise Exhibit 2, Tr. p. 238. He placed this plat on record, as he testified, because Bouldin wanted to have it on record, as he was the County Surveyor, and next in authority after the Government. Tr. p. 235.

The law in force in Arizona at that time provided that

it should be the duty of the County Surveyor to make any survey at the application of any person, and to keep a fair record of all surveys made by him in his office. The section is as follows:

“562. The Surveyor must make any survey that may be required by order of the court, or upon application of any person, keep a correct and fair record of all surveys made by him, number them in the order made progressively, and preserve a copy of the field notes and calculations of each survey, endorse thereon its proper number, a copy of which, and a fair and correct plat, together with the certificate of survey, must be furnished by him to any person upon payment of the fees allowed by law.”

Rev. Stats. of Ariz. of 1887, Par. 562.

And on this plat, so filed by Roskruge in his office of County Surveyor, the tract of land described in the 1866 location is designated and called “**Baca Float No. 3,**” being Tract 2 on our diagram.

A map of the survey of Baca Float No. 3, as made by Mr. Roskruge, being the same as the elaborate topographical map before referred to, was also filed in the office of the Surveyor General of the United States, being the survey according to the 1866 description, and on this map the tract of land is called “**Baca Float No. 3.**” This map is Defendants Wise Exhibit 6, and has also been sent up as an original record in the case.

In the years 1890-1-2-3 Roskruge was employed to make a map of Pima County, which he did. This map,

by resolution of the Board of Supervisors of Pima County of July 22, 1893, was adopted as the official map of Pima County. A photographic copy of this map was introduced in evidence as "Defendants Wise Exhibit 3," and this map also is sent up with the record in this case for the consideration of this court.

On this official county map are delineated the private land claims or Mexican grants, Indian Reservations, etc., and amongst other tracts of land, is delineated the out boundaries of the tract of land described in the 1866 location; and this tract of land is marked on the map, **Baca Float No. 3**, being Tract 2 on our diagram.

So that, not only in the office of the County Surveyor of Pima County, and in the office of the U. S. Surveyor General of Arizona, were maps filed which showed the tract of land then known and called by the name of "Baca Float No. 3;" but the tract known by that name was also marked and delineated upon the official map of Pima County. And the tract of land so denominated and named "Baca Float No. 3," was the identical tract of land described in the 1866 location, being Tract 2, on our diagram.

Fourth. Roskrige further testified that he first heard of Baca Float No. 3 in the early 70's, when he was in the Surveyor General's office, and that from that time up to the year 1899, Baca Float No. 3 was supposed to be about where he surveyed it in 1887. Tr. p. 247.

Fifth. Now, the tract of land described in the 1863 location was not known by the name of "Baca Float No.

3" prior to the decision of the Secretary of the Interior in 1899, when the 1866 location was declared invalid; but, so far as any part of the 1863 location had a name at all, it was known and called "Tumacacori and Calabasas Grant."

Referring now to the map, Defendants Wise Exhibit 34, Tr. p. 379, which shows the relative positions of the 1863 and 1866 locations, there will be seen delineated within the boundaries of the 1863 location, two tracts of land in the valley of the Santa Cruz river, which on that map are designated as the "Tumacacori and Calabasas Grants."

In 1880 the Surveyor General of Arizona caused an official survey of those two grants to be made, being claimed Mexican land grants, and an official map was made of the survey, which in that year was filed in his office as a public record. The map of this survey is defendants Wise Exhibit 5, the original of which has been transmitted to this court with the record in this case. This map of survey shows that what is now, and since 1899 has been, called "Baca Float No. 3," was then, so far as it had a name at all, called "Tumacacori and Calabasas Grants."

In 1879, John Curry and C. P. Sykes, who claimed to be the owners of the Tumacacori and Calabasas grants, filed their petitions with the Surveyor General of Arizona, wherein they prayed for confirmation of their title to said lands. In this petition, amongst other things, they said:

“that they are the owners, under various mesne conveyances from the original grantees and denouncers, of a certain tract of land, or Rancho, situate in the County of Pima and the Territory of Arizona, known by the name of “Tumacacori” and “Las Calabasas,” a particular description of the location and boundaries of which tract of land or Rancho is clearly and explicitly given in the original expediente of the title. . . .

. . . .whereupon the lands now claimed by your petitioners were denounced and purchased by Don Francisco A. Aguilar, and that they have been owned and possessed by the said Aguilar and his successors from the date of said denouncement down to the present time; and that the possession thereof during this time has been continuous, save when unavoidably prevented by the hostility of the neighboring savages, and your petitioners, under their purchase aforesaid, are now in possession and useful occupation of the said lands; having expended large sums of money in the development and improvement thereof.” Defendants Wise Exhibit 4, Tr. p. 241.

After the creating of the Court of Private Land Claims, by Act of Congress of March 3, 1891, the claimants of the Tumacacori and Calabasas grants presented to that court their petition for a confirmation thereof. That court held the grants to be invalid, which judgment was thereafter affirmed by the Supreme Court of the United States, in the case of Taxon vs. U. S., 171 U. S., 224-260.

But, up to the time of this decision in 1898, the tracts of land, so situate in the valley of the Santa Cruz river,

within the limits of the boundaries described in the 1863 Baca location, were known and called the "Tumacacori and Calabastas Grants." And those lands were not known by the name of "Baca Float No. 3" at all, until 1899 and thereafter.

The witness George J. Roskruge testified that, in 1880, when the map of the Calabastas and Tumacacori Grants was made by the U. S. Surveyor General, he was in the U. S. Surveyor General's office, and himself made the map. He further testified he knew where those grants were, and he further testified:

"The lands which were included within this survey" (survey of the Tumacacori and Calabastas Grants) "were not at any time prior to the year 1899, known by the name of 'Baca Float No. 3.' The name of those lands included within the limits shown on this map as Calabastas and Tumacacori were known as Calabastas and Tumacacori Land Grants, and they were in the valley of the Santa Cruz. . . .

"I first heard of Baca Float No. 3 some time in the early 70's, when I was in the Surveyor General's office; that was in 1870; from that time up to the year 1899 Baca Float No. 3 was always supposed to be in the Santa Rita mountains; I never heard of its being located anywhere but in that district." Tr. pp. 247-248.

The foregoing facts, which are in evidence in this case, and which are not disputed by any witness, show conclusively, that the tract of land known as "Baca Float

No. 3," in the years 1893 and 1894, when each and all of the deeds to Alexander F. Mathews, before enumerated, were executed, was the tract of land described in the 1866 location, and no other tract whatsoever.

The answer then, to the question, "What lands were known by the name of 'Baca Float No. 3,' in the years 1893 and 1894, when the seven deeds above enumerated were executed to Alexander F. Mathews?" as answered by all the evidence in this case, is, **The lands described in the 1866 location.**

This fact being ascertained, we again call attention to the description of the tract of land in each of the seven deeds to Alexander F. Mathews, and ask the court to read that description. It is as follows:

"the southern one-half of the tract of land known as Baca Float No. 3, containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz:

"Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links; thence east 12 miles 36 chains and 44 links; thence south six miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links, to the place of beginning."

The southern half of the tract known and called at that time "Baca Float No. 3" **was** the tract that was bounded and described as beginning at a point 3 miles

west by south from the Hacienda de Santa Rita, and running thence the courses and distances as called for in each of the seven deeds. This tract was the tract described in the 1866 location; the tract which Roskrige surveyed and which was platted on the maps. It was the southern half of this tract that was conveyed to Alexander F. Mathews, by a description clear, perfect and unambiguous.

The trial court made no finding of fact as to what specific tract of land was known by the name of "Baca Float No. 3," between the years 1866 and 1899, or at all. Nor did the lower court make or file any opinion in this case which would advise counsel upon what theory, or by what process of reasoning, it arrived at the conclusion that the description in each of the seven deeds to Mathews, hereinabove considered, and which specifically conveyed to him the south half of Tract 2, vested his heirs, devisees and executors with title to the south half of Tract 1.

If the tract known as "Baca Float No. 3," in the years 1893 and 1894, had been Tract 1, the piece of land described in the 1863 location; if that tract had been surveyed, monumented on the ground, and official maps made of it whereon it was delineated and named "Baca Float No. 3," as had been done with Tract 2, then plaintiffs (appellees) might invoke the rule that when a tract is conveyed by name followed by a specific description of its boundaries, a variance between the tract so named and the boundaries given, is to be decided in favor of the tract known by the specific name.

This was the rule in the case of *Lodg's Lessee vs. Lee*, 6 Cranch, 237-8; 3 L. Ed. 2110, where an island in the Potomac river, known by the name of "Eden," was conveyed, and the boundaries of the island also were given in the deed. It was held that all the island was conveyed.

But in that case the grantee under the deed did not pretend that at the time his deed was made, an entirely half of the tract of land known as 'Baca Float No. 3,' different island was known by the name of "Eden," to which the specific boundaries given could not possibly apply; and he made no claim that his deed covered this other island.

He claimed, and the court decided, that as the deed conveyed all the island known as "Eden," all of the island was conveyed, although the specific description by the courses and distances given, did not include all the island.

But in the case at bar, there is no variance whatsoever in the description contained in each of the seven deeds to Mathews. In each deed there is conveyed to him the south half of the tract of land known as "Baca Float No. 3," said south half being described as follows: and then follows an accurate and perfect description, by courses and distances, of the tract of land which **was** known and called "Baca Float No. 3," at the time when each of said deeds was executed, being the description of the 1866 location. There is no variance of description in any of those seven deeds. There is nothing to be construed.

A question of fact is to be determined, namely, "What tract of land was known by the name of 'Baca Float No. 3,' in the years 1893 and 1894, when those seven deeds were executed?"

But it being determined, as it must be, from the undisputed evidence in the case, that the tract known and called by that name, in the years mentioned, was the tract described in the 1866 location, being Tract 2 on our diagram, and it being further ascertained and determined, that the south half of the tract known as "Baca Float No. 3," at the time, was the tract specifically described by the courses and distances as given in each of said seven deeds; then it must follow that the descriptions in each of these deeds is perfect; there is no variance in any of them; there is nothing to be construed; the tract of land conveyed by each of these deeds is exactly what each of the deeds states it to be.

If then, as we maintain, the only lands conveyed to Alexander F. Mathews by the seven deeds aforesaid (and he derains his title under no other deeds), is the south half of the tract described in the 1866 location, Tract 2 on our diagram, the court erred in decreeing that plaintiffs, grantees under a deed from the heirs, devisees and executors of Mathews, acquired an 18-19 interest in the south half of the tract described in the 1863 location, Tract 1 on our diagram, an entirely different tract of land.

The tract of land conveyed in each of the seven deeds to Alexander F. Mathews is described as follows:

“The southern one-half of the tract of land known as Baca Float No. 3, containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz: Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, thence north.... thence east.... thence south.... thence west....to the place of beginning.”

The tract of land described in the decree herein, to which the trial court adjudged plaintiffs to be the owners of an undivided 18-19 interest therein, is in said decree described as follows:

“Commencing at a point one mile and a half from the base of the Salero mountain in a direction north 45° east of the highest point of said mountain, running thence from said beginning point west.... thence south.... thence east.... thence westto the place of beginning, etc.” Tr. p. 536.

The initial point of each of the descriptions is different; the lines are run by different courses; and they are entirely different tracts of land, all of which is plainly shown on the diagram of the two tracts.

We therefore submit, that as plaintiffs deraign their title under the seven deeds to Mathews, and as none of these deeds to Mathews convey to him the tract of land described in the decree; the lower court erred in adjudging plaintiffs to be the owners of 18-19 interest in the tract so described in the decree; and erred in quieting their title thereto.

Further Consideration of Assignment of Error I.

Not only did Alexander F. Mathews himself not own the southern half of the tract described in the 1863 location, as shown in the preceding consideration of the deeds executed to him, but the respective grantors in those deeds did not themselves own that tract.

The grantors of Alexander F. Mathews, under the seven deeds heretofore considered, were:

John C. Robinson,

John W. Cameron,

Mrs. A. T. Belknap,

James Eldredge,

Charles Eldredge,

Powhatan W. Bouldin and wife and James Eldredge,

John Ireland and Wilbur H. King.

All of the above named grantors, except John Ireland and Wilbur H. King, derived their title from John C. Robinson, as heretofore shown.

The title which John Ireland and Wilbur H. King had acquired, on February 23, 1894, the date of their deed to Mathews, was under a deed of date February 21, 1885, executed to them by David W. Bouldin, Sr., wherein he conveyed to them an undivided 1-9 of the undivided 2-3 interest which he had acquired from the heirs of Watts in the 1863 location. We therefore concede that John Ireland and Wilbur H. King, at the date

they executed their aforesaid deed to Mathews, did have an undivided 1-9 of 2-3, equal to 2-27, interest in whatever interest David W. Bouldin, Sr., acquired from the heirs of John S. Watts. What that interest was will be hereafter considered. But Ireland and King did not own an undivided 18-19 interest in either tract, and could not convey any such interest to Mathews.

Now, as to John C. Robinson, under whom all of the other above named parties deraigned their title. He deraigned his title under a deed executed to him by Christopher E. Hawley, of date May 5, 1884, Plaintiffs' Exhibit T, Tr. p. 208; and also under a deed executed to him by Powhatan W. Bouldin and James E. Bouldin, of date November 12, 1892, Plaintiffs' Exhibit X, Tr. p. 216.

We will consider the description of the property conveyed in each of these two deeds to Robinson.

In the deed from Powhatan W. Bouldin and wife and James E. Bouldin to John C. Robinson, dated November 12, 1892, the property therein conveyed is described as follows:

“Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north 6 miles, 18 chains and 22 links; running thence east 12 miles, 36 chains and 44 links; running thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links to the place of beginning. **The said tract of land bounded and described in the sen-**

tence immediately foregoing this being the southern half of the tract known as location No. 3 of the Baca series.” Plaintiffs’ Exhibit X, Tr. pp. 216-219.

It will be observed that in the foregoing description the tract of land is not called “Baca Float No. 3.” In this regard the description is different from the seven deeds made to Alexander F. Mathews, heretofore considered. But the grantors therein declare that the lands therein described, with the beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, **is the tract of land known as “Location No. 3 of the Baca series.”**

There is no ambiguity in the description of this tract of land; for the grantors specifically state what they mean by the tract of land known as “Location No. 3 of the Baca series;” and they say it is the particular tract of land that is bounded and described in the sentence immediately foregoing, namely, the tract described in the 1866 location.

Under no possible or conceivable rule of construction could the lands described in the foregoing deed be held to cover any other tract of land than the specific tract therein described, as beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, and running thence, etc., being the description of the specific tract of land described in the 1866 location. Therefore, John C. Robinson did not acquire any interest in the tract of land described in the 1863 location, under and by virtue of this deed.

**Deed from Christopher E. Hawley to John C. Robinson,
May 5, 1884.**

In the deed from Christopher E. Hawley to John C. Robinson, of date May 5, 1884, the lands therein conveyed are thus described:

“all the right, title and interest, whatever the same may be, in and to that certain tract of land situate, lying and being in the Santa Rita mountains, in the Territory of Arizona, containing 100,000 acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca, by the United States, and by said heirs conveyed to John Watts, of the Territory of New Mexico, by deed dated on the 1st day of May, A. D. 1864, and by said Watts conveyed to the said Christopher E. Hawley, by deed dated on the 8th day of January, A. D. 1870, bounded and described as follows;

“Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links; running thence east 12 miles, 36 chains and 44 links; running thence south 12 miles, 36 chains and 44 links; running thence west 12 miles, 36 chains and 44 links, to the place of beginning, the said tract of land being known as location No. 3 of the Baca series.”

Plaintiffs' Exhibit T, Tr. pp. 208-210.

There is a reference in the foregoing description to the deed executed by John S. Watts to Christopher E. Hawley, as being the source of Hawley's title. This is

true, for no other deed than the deed from Watts, was ever executed by any one to Hawley.

**Deed from John S. Watts to Christopher E. Hawley,
January 8, 1870, Plaintiffs' Exhibit N, Tr. p. 193.**

The description of the tract conveyed in the deed from Watts to Hawley, referred to in the deed from Hawley to Robinson, is as follows:

“all that certain tract, piece or parcel of land, lying and being in the Santa Rita mountains, in the Territory of Arizona, U. S. A., containing 100,000 acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca, by the United States, and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864, bounded and described as follows:

“Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links, running thence east 12 miles, 36 chains and 44 links; thence south 12 miles, 36 chains and 44 links; thence west 12 miles, 36 chains and 44 links, to the place of beginning; the said tract of land being known as Location No. 3 of the Baca series.”
Plaintiffs' Exhibit N, Tr. pp. 193-197.

This description is identical with the description in the deed from Hawley to Robinson; therefore, whatever tract of land was remised, released and quitclaimed by the Watts deed to Hawley, that same land was by Hawley conveyed to Robinson. Here, then, arises the question: What tract was quitclaimed by Watts to Hawley?

For the same tract of land, by identical description, was conveyed by Hawley to Robinson. Was it the tract of land therein specifically bounded and described, with beginning point at the Hacienda de Santa Rita, and thence running the courses and distances as therein set forth, being the tract described in the 1866 location, Tract 2 on our diagram; or was it some other tract of land, with different beginning point and different courses and distances, as claimed by plaintiffs and defendants Bouldin, appellees herein.

We will analyze each recital of this description; we will consider all the facts as they existed when this deed was made, so far as those facts are disclosed by the evidence in this case; we will consider the acts and declarations of Hawley himself upon his one and only visit to the tract, in 1875, and we will show that it was the intention of the parties to describe the tract of land described in the 1866 location, being the tract which, as a fact, is actually described by metes and bounds in the deed itself.

And we will further show, that under this deed, Hawley only acquired such interest as John S. Watts then had to the tract of land described therein, being the same tract of land described in the 1866 location; and that he acquired no interest in any other tract of land whatsoever.

The description of the tract of land quitclaimed by Watts to Hawley, as above set forth, is contained in one sentence, composed of six recitals or clauses, as follows:

(1) All that certain tract, piece or parcel of land, **lying and being in the Santa Rita mountains**, in the Territory of Arizona, U. S. A.,

(2) containing 100,000 acres, be the same more or less,

(3) granted to the heirs of Luis Maria Cabeza de Baca by the United States,

(4) and by said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864,

(5) bounded and described as follows: Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links; running thence east 12 miles 36 chains and 44 links; thence south 12 miles, 36 chains and 44 links; thence west 12 miles, 36 chains and 44 links, to the point or place of beginning,

(6) the said tract of land being known as Location No. 3 of the Baca series. Tr. p. 194.

We will consider each of the foregoing clauses or recitals in detail.

(1) The tract is described as a **certain** tract, piece or parcel of land; not an indefinite tract, piece or parcel of land; and it is a certain tract of land **situate in the Santa Rita mountains**, Territory of Arizona.... "bounded and described as follows: Beginning at a point 3 miles west by south from the building known

as the Hacienda de Santa Rita, running thence north," etc., being the identical description of the tract as located in the 1866 location.

In the center of the tract so described, is a mountain over 9,000 feet high, called Mt. Wrightson, or Old Baldy. (See topographical map made by Roskruge, Defendants Wise Exhibit 1 and Exhibit 6, also map of Pima County, Exhibit 3, and map of the two locations, Wise Exhibit 34.)

From the window in the court room of the U. S. District Court in Tucson, when this case was tried, this mountain could be seen, a distance of 45 miles away; a land mark unmistakable. Roskruge, a witness on the stand, testified:

"Looking south from this court house, a distance of about 45 miles, you see a peak something over 9,000 feet high, in the Santa Rita mountains; I know the name of that peak; its name is Mt. Wrightson, or Old Baldy; that mountain is platted upon the map that I made, Defendants Wise Exhibit 1, as Mt. Wrightson. . . .; now in regard to this location Baca Float No. 3 that I surveyed; it takes in both slopes of the Santa Rita mountains; it takes in very little but mountains and foothills." Tr. p. 239.

The tract which Roskruge had theretofore surveyed was the tract described in the 1866 location; the same tract described in the Watts-Hawley deed.

An inspection of the official map of the tract described

in the 1863 location, the map made by Philip Contzen, under the order of the U. S. Surveyer General of Arizona, approved by the Secretary of the Interior, and now on file in the General Land Office, being Plaintiffs' Exhibit Q, sent up with the record, shows that the Santa Cruz river runs from north to south through the entire 1863 location. The eastern limits of this tract terminate in the foothills of the Santa Rita mountains; but not in the mountains themselves. This tract, the 1863 location, is essentially in the valley of the Santa Cruz. On this point the witness Philip Contzen, who made this official survey, testified:

“Q. Are you acquainted with the range known as the Santa Rita mountains? Yes sir, I am.

“Q. Now, the range known by that name, does that survey of the 1863 location take in the Santa Rita mountains? A. It does not, only portions of the southern slope, or rather the southwestern slope, of the Santa Rita mountains, near the Salero hill.

“Q. But the mountains known as the Santa Ritas proper, not the foothills of the mountains, but the mountains themselves, are they within the '63 location as surveyed by you? A. They are not.”

Tr. pp. 378-382.

He further testified:

“On my official map (Exhibit 34) there are platted in, the Tumacacori and Calabasas; those names

are the names of certain land grants that existed at that time, or before, along the Santa Cruz valley—Mexican land grants.

“Q. What kind of land did those two grants take in, in regard to their being valley or mountain lands? A. Principally valley lands.”

Tr. pp. 378-382.

Therefore, as the tract which was quitclaimed by Watts to Hawley, was specifically described as a certain tract of land, **situate in the Santa Rita mountains**, that description could not cover a tract of land that was not situate in the mountains at all, but was situate in the valley of the Santa Cruz. The tract of land described in the 1866 location **is** situate in the Santa Rita mountains; the tract described in the 1863 location is in the valley of the Santa Cruz.

This clause in the description in the Hawley deed can only apply to the 1866 location.

(2) The next recital is: “containing 100,000 acres, be the same more or less.” This applies to both tracts of land, for each contains about 100,000 acres.

(3) The next recital is: “granted to the heirs of Luis Maria Cabeza de Baca by the United States.” This recital was correct, according to the facts as understood in 1870, when the Watts-Hawley deed was executed.

As heretofore said, in our statement of the facts of the case, John S. Watts, as attorney for the Baca heirs, in

1863, selected for them, as one of the five locations to them permitted to be made by the Act of 1860, the tract of land we call the 1863 location. His selection is in writing, and is as follows:

“Santa Fe, New Mexico, June 17, 1863.

“John A. Clark, Surveyor General, Santa Fe, New Mexico.

“I, John S. Watts, the attorney for the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the Act of Congress approved June 21, 1860, the following tract, to-wit: Commencing at a point one mile and a half from the base of Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico, now included by Act of Congress approved February 24, 1863, in the Territory of Arizona, said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.”

“John S. Watts, Attorney for the heirs of Luis Maria Cabeza de Baca.”

Tr. p. 174.

Thereafter, and on April 30, 1866, John S. Watts, as attorney for the heirs of Baca, made request that this

selection be amended by changing its initial point, to a point 3 miles west by south from the building known as the Hacienda de Santa Rita, and thence to run as set forth in his application. In this application, the petition in 1866, Watts says:

“I further state that the existence of war in that part of the Territory of Arizona, and the hostility of the Indians, prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been made, because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles, 36 chains and 44 links, thence east 12 miles, 36 chains and 44 links, thence south 12 miles, 36 chains and 33 links, thence west 12 miles, 36 chains and 44 links, to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which **would have been set apart** by the location as first solicited, but is not the land intended

to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given the Surveyor General to correct the mistake." Tr. p. 176.

This application of Watts for survey according to amended location, was granted by the Commissioner of the General Land Office in 1866. Watts undoubtedly considered that the lands granted to the Baca heirs under the Act of 1860, and selected for them by him as location 3, was the specific tract which was ordered to be surveyed according to the amended description, as set forth in his application of 1866; which application had been granted by the Commissioner of the General Land Office.

The fact, as it existed at that time; or rather, what was believed to be the fact at that time; was, that the tract specifically described in Watt's application of 1866, namely, the tract of land having its beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, and running thence from said beginning point, according to the courses and distances set forth in said application, was the tract granted by Act of Congress to the heirs of Baca, as location 3.

Not only was such believed to be the fact in 1870, when Watts executed his deed to Hawley, but it continued to be considered a fact until July 25, 1899, when

the Secretary of the Interior, upon an application to survey this amended location, held that this amended location was not an amended location at all, but was the selection of a different tract of land than the one selected in 1863, and being selected after the expiration of the three years limited in the Act of 1860, was void. Decision of Secretary of the Interior, July 25, 1899, 29 L. D. pp. 44-54.

Prior to 1899, the Land Department of the United States itself considered that the tract described in the 1866 location was the land selected by the heirs of Baca. Thus on June 15, 1887, Secretary Lamar said:

“It is conceded that a selection was made, the location designated and approved by the surveyor general June 16, 1863, agreeable to the provisions of the Act. It appears that this selection was amended upon application made therefor April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that instruction for the survey of the location, as amended was issued by your office May 21, 1866.

The claimant must be held to this selection and location, and cannot be allowed to re-locate other land in lieu of it.”

5 L. D. 107.

The recital, then, in the deed from Watts to Hawley, that the tract of land therein described as situate in the Santa Rita mountains, bounded and described as commencing from the Hacienda de Santa Rita, etc., was the tract granted to the heirs of Baca, was believed to

be a fact at the time that the deed was executed.

(4) The next recital in the Watts-Hawley deed is: "and by said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864."

This is true so far as the "overlap" is concerned. It is not true so far as the other part of the tract described in the 1863 location is concerned. We will consider this recital at greater length hereafter.

(5) The next recital is "bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence etc."

This is a definite description, by metes and bounds, from a beginning point well known, which describes accurately the tract described in the 1866 selection, and also accurately and definitely describes a tract of land on the earth's surface.

As we have heretofore shown, the beginning point of this description, the Hacienda de Santa Rita, was a well-known place. During the trial the evidence was so overwhelming on this point, that the lower court, to obviate the necessity of further testimony upon the point said:

"I find that the Hacienda de Santa Rita is a well-known place." Tr. p. 385.

So correct and complete is the foregoing description,

by courses and distances, that thereafter Roskruge, the County Surveyor of Pima County, without any difficulty whatsoever, went upon the ground and made a survey of the tract, in accordance with this specific description.

(6) The next, being the last recital, is: "said tract of land being known as Location No. 3 of the Baca series."

The tract of land referred to, as being then known as "Location No. 3 of the Baca series", was the land described in the preceding sentence; namely, the land "bounded and described as follows: "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence, etc."

Watts, in this deed, says that those lands are known as "Location No. 3 of the Baca series." As the Commissioner of the General Land Office had accepted his amended location of 1866, the foregoing statement was not only believed to be the fact by Watts, but was believed to be the fact by the Land Office itself. That tract, described in the 1866 location, was, at that time, to-wit: in 1870 and thereafter, and until 1899, generally known to be the location No. 3 which had been accepted by the Commissioner of the General Land Office.

A consideration of the history of the various selections made for "Location No. 3 of the Baca series", will shed light upon what John S. Watts meant by the words "said tract of land being known as 'Location No. 3 of the Baca series.' "

It is a fact that John S. Watts, as attorney for the Baca heirs, had made **three** different selections of land, for "Location No. 3 of the Baca series."

His first selection was made October 30, 1862, being of a tract of land at a place known as Bosque Redondo, on the Pecos River, in New Mexico. This selection was approved by the Surveyor General of New Mexico on November 8, 1862. This tract on the Pecos River was the first selection of Location No. 3 of the Baca series. Re. Baca Float No. Three, 29 L. B. 45.

Thereafter, and on January, 18, 1863, Watts, as attorney for the Baca heirs, made application to the Commisisoner of the General Land Office, to withdraw this selection with a view of making another selection in a more desirable locality. This application was allowed February 5, 1863. Id. 29 L. D. 45-46.

Watts having been allowed to withdraw his first selection, thereafter, and on June 17, 1863, as attorney for the Baca heirs, made his second selection, being the tract having its commencing point at the base of the Salero mountain, in Arizona; the tract in this brief designated as the 1863 location. This was the second "Location No. 3 of the Baca series." Id. 29 L. D., 46.

After making this second selection, being the 1863 location, certain heirs of Baca conveyed to Watts, by deed executed May 1, 1864, the tract described in this 1863 selection. The deed being Plffs. Exhibit C, Tr. p. 154.

Two years after this conveyance to him, to-wit, on April 30, 1866, Watts, still signing himself "attorney for the heirs of Baca" made application to the Commissioner of the General Land Office for leave to amend the selection so made in 1863, so that the initial point should "commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles," etc. This application was allowed, and the Commissioner instructed the Surveyor General to make the survey of the location in accordance with this amended description. This was the Third "Location No. 3 of the Baca Series." Id. 29 L. D. 47.

The tract first selected was permitted to be withdrawn.

Each of the three different tracts of land was "Location No. 3 of the Baca series."

The tract second selected was permitted to be amended by substitution of a different commencing point and different courses, so as to cover an almost entirely different tract of land; and this last described tract, by its amended description, became in the opinion of Watts, the Commissioner, and the Surveyor General, "Location No. 3 of the Baca Series." And, as we have heretofore shown, this tract, described in what we have been designating as the 1866 location, was by the Secretary of the Interior and the Commissioner of the General Land Office, considered as "Location No. 3 of the Baca series", until the year 1899, when

the Secretary rendered the decision in 29 L. D. 44-54, to the effect that the 1866 location was not an amendment of the description in the 1863 location, but was the selection of an entirely different tract of land, and having been made after the time limited by the Act of Congress for making a selection, was void.

But, until this decision of 1899 was rendered, the tract described in the 1866 location was considered as the particular tract of land which, under the rulings of the Land Department, had been allowed as Location No. 3 of the Baca series; and by that name the tract of land described in the amended selection was known.

Therefore, when John S Watts executed his deed to Hawley, on January 8, 1870, he had every reason to believe, and he did believe, that the tract described in his 1866 location, being the same tract he described by metes and bounds in his deed to Hawley, was "Location No. 3 of the Baca series."

And for that reason, we say, viewed in the light of the facts as they existed when that deed was made, the tract of land specifically described in the Watts-Hawley deed was "Location No. 3 of the Baca Series", as known and accepted at that time.

There remains only to be considered recital (4) in the Description in the Watts deed to Hawley, to-wit: "and by said (Baca) heirs conveyed to the party of the first part (Watts) by deed dated on the 1st day of May, 1864."

The tract of land conveyed to Watts by the deed of May 1, 1864, was only in part the same as the tract he quitclaimed to Hawley. As to the overlap, it was the same. As to the part outside of the overlap, it was not the same.

Here arises the only variance in the clauses or recitals of description in the Watts-Hawley deed.

The variance is not apparent on the face of Watts to Hawley deed. The deed from the Baca heirs to Watts of May 1, 1864, is not referred to for a more complete description of the property conveyed; no reference is made to it for any specific purpose, it is simply recited as being the source of Watt's title, and not as part of the description.

A surveyor, requested to survey the tract of land as described in the Watts-Hawley deed, would not be called upon to examine the deed from the Baca heirs to Watts, for the reason that in the Watts-Hawley deed no specific reference is made to that deed for description. With the Watts-Hawley deed in his hands, the surveyor would go to the Santa Rita mountains; he would find the place called Hacienda de Santa Rita, a well-known place, as all the evidence shows, and from that place as a point of beginning, he would and could run his lines the exact courses and distances set forth in the Watts to Hawley deed, and thus he would and could survey the specific tract of land quitclaimed by Watts to Hawley. And no one, in court or out of court, could deny that the tract he so surveyed was the specific tract

of land as bounded and described in the Watts to Hawley deed.

As was said by Mr. Justice Miller, sitting on the circuit, in a case where he was called upon to construe a deed where a question similar to the one we are now discussing, was under consideration:

“The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case, is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described. And, if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that.”

Prentice v. Northern Pac. R. Co., 43 Fed. 270-276.

The Supreme Court, in affirming the above case, said:

“Looking into the deed, under which the plaintiffs claim title, for the purpose of ascertaining the intention of the parties, we find there a specific de-

scription by metes and bounds, of the lands conveyed, followed by a general description which must be held to be introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands conveyed." *Prentice v. Northern Pac. R. Co.*, 154 U. S., 163-167, 38 L. ed. 947-953.

And the law is well settled that a general reference in a deed, to another deed, is to be considered as made for the purpose of showing chain of title, and not for the purpose of controlling a description by metes and bounds.

"It is too well settled to require the citation of authority that a particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title. The exception to this rule is where the particular description of land by metes and bounds is uncertain and impossible. Then a general description in the same conveyance will govern."

Smith vs. Sweet, 38 Atl. 554, 90 Me. 528.

"Where a grantor conveys specifically by metes and bounds so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or as in this case, all of a survey except a tract belonging to another person, cannot control, for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description."

Cullers v. Platt, 81 Tex. 858, 16 S. W. 1003.

“We think it clear that the reference to the deed made by Snyder to Sampson Heidenheimer was given merely to point out the title and not to supplement or control the description given by the field notes.”

Shaeffer vs. Heidenheimer, 96 S. W., 61.

In the case of Whiting v. Hugo Dewey, Admstr., 15 Pickering (Mass. 428) the description in the deed was as follows:

“The following tract of land situate in Great Barrington on the pine plain not far from Jabez Turner’s dwelling house, being all and the same land which the said Benedict Dewey, deceased, lately owned in a hundred acre pitch of equalizing land formerly laid out to Conrad Burghart’s right, supposed and considered to be bounded” (here follows specific description) “containing in said described premises at least twenty-two acres and one-fourth of land.”

In considering this description, the court said:

“the grant is ‘of the following described tract of land’; then follows the above cited words, and then follows a particular description of the land granted by metes and bounds; and this particular description is decisive as to the land intended to be granted and to which the covenants are to be referred.

Very little stress is to be placed on words of recital and general description, as to the extent of the conveyance when there is a particular description of the lands conveyed in clear and unambiguous language.”

15 Pick. (32 Mass.) 428-435.

“The general description ‘being the same land,’ given the grantor’s mother to the grantee by will, will not control the specific boundaries in the deed.”

Howell v. Saule, Fed. Cases No. 6782; (5 Mason 410).

“It is a well settled principle that when the land conveyed is described in the deed by clear and well defined metes and bounds so that the boundaries thereof can be thereby readily determined such description shall prevail and settle the boundaries of the land over any general words or description that may have been used in the deed, tending to enlarge or diminish the boundaries.”

Speller v. Scribner, 36 Vt. 245.

Morrow v. Willard, 30 Vt. 118.

Gilman v. Smith, 12 Vt. 150.

Hibbard v. Hulburt, 10 Vt. 173.

Therefore, even if the recital in the Watts to Hawley deed, namely: “and by said heirs of Baca conveyed to the party of the first part by deed dated on the 1st

day of May, A. D., 1864" is held to be repugnant to the particular and specific description of the tract by courses and distances, then the specific description should prevail. And under this rule of construction the tract of land, situated in the Santa Rita Mountains, as bounded and described with the beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, is the tract which John S. Watts quit-claimed to Hawley by his deed of January 8, 1870, being the tract described in the 1866 location.

When the facts, as they existed in 1870 when Watts executed his deed to Hawley, are considered, it will be seen that the recital in that deed of the deed from the Baca heirs to Watts of May 1, 1864, did not create any variance or repugnance in the description; and for this reason, namely, that Watts, as the grantee under the deed from the Baca heirs referred to, thereafter himself being the owner of the tract, caused the description of the tract so conveyed to him, to be amended, so as to cover the specific tract he quitclaimed to Hawley. The facts we refer to are these:

In 1863 Watts, as attorney for the Baca heirs, made selection of the tract having its beginning point at a certain distance from the base of the Salero mountain.

On May 1, 1864, certain heirs of Baca executed their deed purporting to convey this tract to Watts, being the deed referred to in the Watts to Hawley deed.

On April 30, 1866, Watts made application to the

Commissioner of the General Land Office, to amend the description of the tract so conveyed to him. This application was granted by the Commissioner, who ordered the Surveyor General to make the survey according to the amended description. Therefore, the tract of land, described in accordance with the amended description, was the tract which Watts believed he himself owned at the time; and the tract which would have been owned by him, had the amended selection been valid.

The recital, then, of the deed of May 1, 1864, taken in connection with the subsequent action of the Commissioner, allowing the description of the tract of land described in that deed, being the 1863 location, to be amended in accordance with Watts' application of 1866, facts which Watts knew at the time he executed his quitclaim deed to Hawley, and being matters of public record; we submit that this recital created no repugnance or variance whatsoever in the description of the tract quitclaimed by Watts to Hawley. They both knew, and well understood, that Watts, as grantee under the 1864 deed from the heirs, had become the owner of the tract according to the amended description allowed to be made in 1866. That tract Watts quitclaimed to Hawley. The subsequent decision of the Secretary, that the amended location so allowed was void, does not alter the fact that Watts did, prior to that decision, quitclaim the tract described in the amended location, to Hawley.

There is another, more simple, and perhaps more conclusive method, of determining what specific tract

of land was quitclaimed by Watts to Hawley, in the 1870 deed.

We have seen that on July 25, 1899, the Secretary of the Interior held, that this 1866 location was void, because made after the three years limited by the Act of 1860.

Now, if the Secretary of the Interior, had, at that time, decided that the 1866 location, by reason of its acceptance by the Commissioner, **was valid**, and that the heirs of Baca, and their grantees, were bound by **that** selection; what construction would this Court place upon the description of the tract of land, as set forth in the Watts to Hawley deed?

It is manifest that whatever that tract was, it passed to Hawley in 1870, and no subsequent act of the Secretary of the Interior could change the description of that tract, as set forth in the deed itself. The validity of the title might be affected by the action of the Secretary; but the words in the deed, the description of the land as described by those words, was unalterable.

If, then, the Secretary in 1899, **had** decided that the 1866 location was the tract which was selected by the Baca heirs, would this court construe the description in the deed from Watts to Hawley, to be a conveyance of the land described in the 1863 location; the tract not in the Santa Rita mountains, but in the valleys of the Santa Cruz river; the tract having its initial point at the base of the Salero mountain, and not at the Hacienda de Santa Rita.

We think not. Such a construction would do violence to every recital and every clause in the description. Indeed, it would be so clear and beyond dispute, that the deed did describe, in every particular, the tract described in the 1866 location, that there could be no argument about it.

It was 29 years after the deed **was** executed, that the Secretary **did** decide the 1866 location to be invalid. But the certain tract of land described in the Watts to Hawley deed, was still described by the same words.

If, then, the description of the tract quitclaimed by Watts to Hawley would be construed to be a quitclaim of the 1866 location, the tract in the deed specifically described, had the Secretary of the Interior in 1899 decided that the 1866 location was valid; then the same construction should be placed upon the words of description in that deed, the location having been decided to be void.

Appellees contend that under the deed from Watts to Hawley, Hawley acquired title to "Location No. 3 of the Baca series", wherever the same might be situated, irrespective of the specific description in the deed. They contend that what Watts quitclaimed to Hawley was not any specific tract of land, situated at any particular place, or bounded or described by any specific description; but that he quitclaimed to him "Location No. 3 of the Baca Series", wherever situate, or by whatever bounds described; or wherever the Secretary of the Interior might decide it to be.

A mere reading of the Watts-Hawley deed shows it will bear no such construction; for Watts quitclaimed to Hawley a certain and definite tract of land, situate in a definite place, to-wit: the Santa Rita mountains, and bounded and described by definite metes and bounds, having its initial point at the Hacienda de Santa Rita, a well known place, about which there is no question.

If it was Watts' intention to quitclaim to Hawley whatever tract of land the government might thereafter decide to be the true and valid Location No. 3 of the Baca series, he most certainly did not express any such intention in his deed. As said by Mr. Justice Miller, in the case of *Prentice v. Northern Pacific R. Co.*, 43 Fed. 274-5, *supra*:

“If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two descriptive clauses, neither of which had that idea in it.”

Or again, as said by Mr. Justice Miller in the same case:

“Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now as a matter of fact find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu

of that mile square by future proceedings of the government of the United States.”

In the case of *Prentice v. Stearns*, 20 Fed. 819, also decided by Mr. Justice Miller, the description in the same deed, as the one considered in the case of *Prentice v. Northern Pac. R. Co.*, 43 Fed. 270-276, (*supra*) was under consideration.

The question in that case was whether or not, under the description in the deed, a definite tract of land was conveyed, or any tract that the grantor might thereafter acquire from the government. The court held the specific description controlled.

We therefore, submit that under the *Watts to Hawley* deed, *Watts* quitclaimed to *Hawley* the tract of land therein specifically bounded and described, being the tract described in the 1866 location, and did not quitclaim to him any other tract of land.

It is well settled law that where the description in a deed of the land intended to be conveyed, is equivocal, ambiguous or insufficient, the subsequent acts of the parties may be proved for the purpose of ascertaining their intention.

Stone v. Clark, 1 *Metcalf* (Mass) 378. Authorities in note to same case in 36 *Am. Dec.* 373.

We do not think there is any ambiguity or uncertainty in the description of the property quitclaimed by *Watts to Hawley*, but as the lower court thought other-

wise, we will refer to the evidence in the case and show that Hawley himself construed this deed as quitclaiming to him the tract specifically described therein, to-wit, the tract described in the 1866 location.

Hawley resided, as recited in the deed, at Wilkesbarre, State of Pennsylvania.

The evidence discloses that he made one visit to Pima County, Arizona, being in the year 1875, Tr. p. 251.

On this visit he executed a power of attorney to John E. Magee of Tucson, Arizona, authorizing him "to abandon old mining claims and locations of mines in the Santa Rita mountains, Pima County, Arizona, and to relocate the same correctly in conformity with the mining laws of the United States, etc." Hawley acknowledged this power of attorney before a Justice of the Peace in Tucson, on May 4, 1875, and on the same day caused the same to be recorded in the office of the County Recorder. Tr. p. 254.

The date and fact of his visit to Tucson; and his business relations with John E. Magee, are matters of record.

John E. Magee was called as a witness on the trial of this case. He testified that he was 75 years of age; that he was at present Secretary of the Arizona Pioneer's Historical Society; that he came to Pima County, Arizona, in 1874, under the employ of the Sonora Mining & Exploration Company, which purported to hold the title to the amended location of Baca Float No. 3, to take charge of and look after that title and have it sur-

veyed. He had at that time in his possession a diagram showing the relative position of the amended and the original location. He went upon the ground, was shown some of the monuments; that he knew the country included in the amended location, which covered the Santa Rita mountains. He went to the Surveyor General of Arizona, asked for a survey of the amended location; the Surveyor General refused to make the survey on the ground that it was known to be mineral land for one hundred years; this was in 1874; he came here to take charge of the amended location, and had nothing to do with the other location. Tr. p. 249.

In 1875 Hawley came to Tucson. Magee further testified, we will quote from the record:

“I was acquainted with a gentleman by the name of Christopher E. Hawley. I met him here in Tucson in March, 1875, if I am right, I think so. He did not make any statement to me in regard to the Baca Float, or at least, Baca Float No. 3, '66 location at that time. He told me that he was interested, or would be interested, in Baca Float No. 3 and would like to see the country. I showed him what I took and learned to be the amended location of Baca Float No. 3, covering the Santa Rita mountains, as described a little while ago.” Tr. p. 251.

At this time the deed from Watts to Hawley had not been recorded in Pima County, or elsewhere. Indeed, Hawley never did record the deed. The first and only time it was recorded was May 9, 1885 (Tr. p. 196), a

year after Hawley had conveyed to Robinson, when it was recorded at the request of Wm. W. Belknap, (See original Plaintiffs' Exhibit N, sent up with the record) ;

Nor, in 1875, were any of the deeds from the heirs of Baca to Watts, recorded in Pima County. Therefore, when Hawley made his visit, the records of Pima County did not disclose who were the owners of Baca Location No. 3, and all Magee knew was that he was employed by the Sonora Mining & Exploration Company to take charge of the 1866 location and have it surveyed.

What relation, if any, Hawley bore to this mining company, the evidence does not disclose; nor is there any evidence in regard to Hawley, other than this testimony of Magee.

But it does appear, from the testimony of Magee, that Hawley went to him, the man in charge of the 1866 location. He told Magee that he was interested, or would be interested, in Baca Float No. 3, and wanted to see the country. Magee went with him to the Hacienda de Santa Rita, and showed him where Baca Float No. 3 was at that time; and what he then showed him as Baca Float No. 3 was the amended location, covering the Santa Rita mountains. Tr. p. 251.

Hawley at that time had the quitclaim deed from Watts. He came out to see the land so quitclaimed to him, without disclosing the fact that such a deed was executed to him; and he is shown the tract covering the Santa Rita mountains, the 1866 location, as being Baca

Float No. 3 at that time. He makes no demur. He makes no protest.

He sees the tract of land situate in the Santa Rita mountains; he sees the Hacienda de Santa Rita, the initial point of the 1866 location; he ascertains where the tract is that is described in Watts' deed to him; and he is content.

Never, from that day to this, has Hawley even contended, so far as the evidence in this case shows, that Watts quitclaimed to him any other or different tract of land, than the tract he visited with Magee in 1875.

On May 5, 1884, Hawley, by deed of that date, with description in the identical words of the description in the deed from Watts to himself, conveys the same tract to John C. Robinson, Tr. p. 208.

Not only did Hawley himself believe that the tract of land quitclaimed to him by Watts, was the tract in the Santa Rita mountains, having as the initial point of its description the Hacienda de Santa Rita; but John C. Robinson, to whom he conveyed this tract, positively declared that that specific tract is "Location Number 3 of the Baca Series."

This declaration is made by Robinson in the deed he executed to Powhatan W. Bouldin and James E. Bouldin of date November 19, 1892. Deft. Wise Exhibit 38, Tr. p. 400. He makes this declaration twice in the same deed, first in the recitals, and then in the description, so that there can be no question.

In this deed Robinson declares:

“The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract of land known as Location No. 3 of the Baca series.”

and the tract described in the sentence so referred to, is the tract described in the 1866 location; described in the deed from Hawley to him and described in the deed from Watts to Hawley.

Therefore, the interpretation placed by Hawley on the description of the tract quitclaimed by Watts to him; and by Robinson on the tract Hawley conveyed to him; makes it conclusive that the tract conveyed, and intended to be conveyed, described and intended to be described, was the tract described in the 1866 location.

Such being the fact, the lower court erred in its decree wherein it adjudged that plaintiffs, who deraign their title under Hawley, were owners of an undivided 18-19 interest in the south half of the tract of land described in the decree; being a different tract of land than the tract quitclaimed by Watts to Hawley.

The Wrightson Title Bond.

Plaintiffs introduced in evidence, upon the trial of this case, over objection, for the purpose of showing that the land quitclaimed by Watts to Hawley, was the tract described in the 1863 location, a certain instrument in writing, purporting to be signed by John S.

Watts, on March 2, 1863, and acknowledged February 8, 1864, as follows:

“KNOW ALL MEN BY THESE PRESENTS, that I, John S. Watts, of the city of Santa Fe, Territory of New Mexico, and the owner of one of the unlocated floats, containing about 100,000 acres of land, granted to the heirs of Luis Maria Baca by Act of Congress, approved 21 June, 1860,” (here follows a copy of the Act).

“Be it further known that the said John S. Watts has full power and authority to make the location of said heirs, under said act, and cause to be made a title in fee for the same after such proper location and survey;

Now, therefore, be it further known that I, the said John S. Watts, have this day sold to Wm. Wrightson of the city of Cincinnati, State of Ohio, the said unlocated tract, with all its privileges, for and in consideration of the sum of One Hundred and Ten Thousand Dollars, the receipt whereof is hereby acknowledged and I hereby bind myself, my heirs, executors or administrators to make a full and complete title in fee simple for said land to said William Wrightson, his assigns or legal representatives whenever thereunto required.

And I, the said John S. Watts hereby authorize and empower the said W. Wrightson to make the location under the same act in as full and ample manner as the said heirs could do the same.”

Plaintiff's Exhibit L, Tr. p. 182.

This instrument has never been recorded. There is

no evidence that Wrightson assigned it to Hawley or to any one else. Nor did it appear that Hawley had any interest in it, or had ever seen or heard of it. Nor is there any evidence in any way connecting it with the the execution of the quitclaim deed from Watts to Hawley of date January 8, 1870.

Samuel A. M. Syme, a witness for plaintiffs, testified that he gave this paper to the plaintiffs; that in the fall of 1894, or the winter of 1895, thirty-one years after the paper was executed, he had himself received this paper in connection with a number of papers, which were in a satchel, from James Eldredge, to whom Hawley, in 1870, had executed a power of attorney. Testimony of Syme, Tr. p. 189.

That is all the evidence there is in his case in regard to this so-called "Wrightson Title Bond."

This instrument, executed in 1863, wherein John S. Watts sold to Wm. Wrightson, one of the unlocated Baca tracts and agreed to execute to him a fee simple title thereto whenever required, is considered by appellees as evidence competent, relevant and material, to be considered by the court, to aid it in construing the words of description as contained in the quitclaim deed from John S. Watts to Christopher E. Hawley, executed in 1870, seven years after the title bond was signed.

They so argued before the lower court, and it is fair to presume they will so argue to this court.

If this were a suit for a specific performance of the contract set forth in the title bond, which it is not, plaintiffs would have to prove some assignment of this contract to themselves. They do not pretend to do this. At least, they would have to prove an assignment thereof to Hawley; this they utterly fail to do. But if they had done this, then they would have to prove that Watts had not made deed to Wrightson, as he agreed to do in that instrument, and even then no court of equity would decree specific performance of a contract after the lapse of fifty years.

If this were a suit for the reformation of the Hawley deed, which it is not, the court would require definite and positive proof (1) that the quitclaim deed to Hawley was executed in pursuance of the title bond to Wrightson and not as an independent transaction; (2) that Hawley was the assignee of Wrightson, by an instrument in writing valid under the statute of frauds; and (3) that a mutual mistake had been made in describing the tract of land in the Watts-Hawley deed. And even then, no court would decree reformation of a deed forty-five years after its execution.

But this is not a suit for specific performance; nor a suit to reform a deed; it is an action to quiet title, in which the deed from Watts to Hawley is offered in evidence by plaintiffs as proof of their title. The only question is "What tract of land is described therein?"

And even if the Wrightson title bond had been assigned to Hawley, which it was not; even then it would

be utterly incompetent as evidence in aid of the description in the Watts-Hawley deed, for the deed stands alone as embodying the contract between the parties, and an extraneous previously executed instrument cannot be permitted to alter or vary the terms of the deed.

As said by the Supreme Court, in *Parker v. Kane*, 22 How. 1-19; 16 L. ed 286-292, at the conclusion of its decision:

“It” (the description of the land in the deed) “cannot be controlled by the declaration of the parties, or by proof of the negotiations or agreements on which the deed was executed.”

In the case of *Modlin v. Roanoke R. & Lumber Co.*, 58 S. E. 1075; 145 N. C. 218, the court held:

“An option on property given prior to a deed of it, is inadmissible in aid of the description in the deed, where the latter stands alone as embodying the contract, and makes no reference to the option.”

In that case the court said:

“An effort is made to support the interpretation of the deed insisted on by defendant by construing the deed and option together, using the option in aid of the description contained in the deed. It is a familiar learning, however, that user of the option for such purpose is not permissible. The deed now stands alone as embodying the contract between the parties. It makes no reference to the option for description, or for any other purpose;

and while this last paper is competent evidence on the question of fraud, and to show whether or not the deed complies with the option, the authorities are clear that the paper is not relevant in aid of the description in the deed, and any attempt to use it for such purpose would therefore be improper.”

Modlin v. Roanoke R. & Lumber Co., 58 S. E., 1075, 145 N. C. 218.

Also McManus v. Chollar, 128 Fed. 902.

What the Supreme Court said in the case of *Russel v. Trustees*, 1 Wheat, 433-439, which was a suit for the reformation of a deed, is applicable to the present suit, wherein plaintiffs under the guise of a suit to quiet title, are really seeking the reformation of all the deeds under which they deraign title. The Court said:

“Where A conveys to B. by metes and bounds, the circumstances ought to be very strong to prove that he meant to convey any other lands than those specifically described, before this court would be induced to set aside one deed, and decree the execution of another. If the vendee may set up such a ground of equity, the vendor may do the same; and the intrinsic difficulties which such investigations would present, would make it generally better to leave the parties to their remedy at law. If a person, supposing himself possessed of a specific tract of land, in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less that he would have sold it for the

same price.” “But where an individual, supposing his warrant located on black acre, when it is, in fact, located on white acre, conveys the former by metes and bounds, it must be a strong case that will sanction a court in setting aside the conveyance of the one, and decreeing that of the other.”

But the present suit, being an action to quiet title, we say, quoting the language of the Supreme Court in *Prentice v. Northern Pac. R. Co.*, 154 U. S., 163-177, supra:

“If this were a suit in equity to compel the reformation of the deed upon the ground that, by mistake of the parties, it did not properly describe the land intended to be conveyed, and if such a suit were not barred by time, a different question would be presented upon the merits.”

Recapitulation as to Assignment 1.

The court decreed plaintiffs to be the owners in fee of an undivided 18-19 interest in the southern half of the lands in dispute, which we call Tract 1. This is assigned as error, being contrary to the evidence in the case.

The evidence shows:

1. Plaintiffs are grantees under a deed from Samuel A. M. Syme and the heirs, etc., of Alexander F. Mathews, deceased.

2. Syme had no title for three reasons: First, because the deed from Robinson to him conveyed the north half

of Tract 2; second, because Robinson had theretofore conveyed the same north half to Powhatan W. and James E. Bouldin; and third, Robinson himself did not have title to Tract 1.

3. The heirs, devisees and executors of Alexander F. Mathews deceased, had no title to Tract 1, because they only had such title as Alexander F. Mathews acquired, and he did not acquire any title to Tract 1.

4. The several grantors in the seven deeds executed to Alexander F. Mathews all deraigned whatever title they had, under deeds from John C. Robinson; and Robinson deraigned his title under two deeds, one of date November 12, 1892, from Powhatan W. Bouldin and James E. Bouldin, and the other from Christopher E. Hawley, of date May 5, 1884.

5. The property described in the deed from the Bouldins to Robinson, supra, was the tract described in the 1866 location. There was no evidence that the two Bouldins had any title whatsoever, at the time they executed this conveyance, so that, in no event, did Robinson acquire any title from them to the 1866 location.

6. The deed from Christopher E. Hawley to Robinson, supra, specifically described the tract quitclaimed to him, by the description of the 1866 location, and only conveyed that tract.

7. The deed from John S. Watts to Hawley only

quitclaimed to him the tract therein described, being the 1866 location.

8. The deed from Ireland and King also only purported to convey what interest they had in the 1866 location, and as they owned only a small interest in the 1863 location, in no event could they convey, even by proper deed, a greater interest in either tract than they had.

12. As neither Alexander F. Mathews himself, in his lifetime, nor any of his grantors, or the grantors of his grantors, owned an 18-19 interest in the south half of the tract described in the 1863 location, being the tract described in the decree, plaintiffs could not and did not acquire title thereto.

For these reasons the decree of the lower court is erroneous, so far as the undivided 18-19 interest adjudged to be in plaintiffs is concerned, and should be reversed.

ASSIGNMENT OF ERROR II.

The court erred in adjudging that the title in fee to an undivided 18-19 interest to the north half of the land in the decree described was vested in the defendants Bouldin in the proportions mentioned in the decree, or in any proportions whatsoever, and in quieting their title thereof.

The court in its decree in this case adjudged that the 18-19 interest in the north half of the tract in dispute was vested in fee in the defendants Bouldin in the following proportions: To Jennie N. Bouldin, 18-38 interest; in David W. Bouldin, 18-76 interest, and Helen Lee Bouldin, 18-76 interest, making a total of 18-19 interest. This is assigned as error, being contrary to the evidence.

The only title which the foregoing named defendants Bouldin acquired to the undivided 18-19 interest in the north one-half of the lands described in the decree, was such title, if any, as was acquired by Powhatan W. Bouldin and James E. Bouldin, under the deed executed to them by John C. Robinson of November 19, 1892, Defendants Wise Exhibit 38, Tr. p. 400.

The defendants Bouldin deraign and claim their title under said Powhatan W. and James E. Bouldin, so all we need consider in this assignment of error is, what title, if any, Powhatan W. and James E. Bouldin acquired to the north half of the tract of land in dispute, under the deed of Robinson, to them, of date November 19, 1892, Defendants Wise Exhibit 38, Tr. p. 400.

We assert that the tract of land conveyed by Robinson to Powhatan W. and James E. Bouldin in that deed, and specifically described therein, is the north half of the tract of land described in the 1866 location. The mere reading of the deed proves this to be so beyond possibility of question.

The property conveyed is thus described in said deed:

“the said party of the first part does hereby grant . . . to the said parties of the second part, their heirs and assigns forever, one-half of the above described premises, bounded and described as follows, viz: Beginning at a point six miles, eighteen chains and twenty-two links north of a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links; running thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains and twenty-two links; running thence west twelve miles, thirty-six chains and forty-four links, to the place of beginning. **The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location Number three (3) of the Baca series.**”
Tr. p. 400.

The reference in the description to the “above described premises,” is a reference to a recital in the deed, which recital is as follows:

“That whereas, the parties of the first and second parts, by deeds exchanged between them, the said

parties of the first and second parts, for the consideration therein specified, have granted and conveyed each to the other their heirs and assigns (the party of the first part, by deed executed at Binghamton, New York, dated twenty-eighth day of June, A. D. 1892, and the parties of the second part by deed executed at Austin, Texas, dated twenty-second day of August, A. D. 1892) an undivided half interest in all their rights, titles, property, claims and demands whatsoever, from whatever source derived, and in whatever manner acquired, in and to a certain tract of land, situate, lying and being in the Santa Rita mountains, in the Territory of Arizona, containing one hundred thousand acres, be the same more or less; bounded and described as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita; running thence north twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south twelve miles, thirty-six chains and forty-four links to the place of beginning. The said tract of land being known as Location Number three (3) of the Baca Series." Tr. p. 400.

It will be observed that the tract of land is not referred to in this deed as being "the tract known and called Baca Float No. 3." It is not designated by that name. It is described as being a tract situated in the Santa Rita mountains, bounded and described in accordance with the description of the 1866 location; and then follows the statement, that **"the said tract of land bounded and described in the sentence immediately foregoing this**

being the northern half of the tract known as Location number three of the Baca series.”

We submit that this deed is a conveyance simply of the tract of land so specifically and clearly described therein, to-wit, the northern half of the 1866 location; and that under no rule of construction can it be deemed a conveyance of any other or different tract of land.

As the tract of land so described therein is the northern half of the tract described in the 1866 location, Tract 2 on our diagram, it is not a conveyance of the northern half of an entirely different tract of land, to-wit, of the tract described in the 1863 location, Tract 1 on our diagram.

The lower court therefore erred in its decree, adjudging that defendants Bouldin, who claim title under this deed, have either an 18-19 interest, or any interest whatsoever, in the northern half of the lands described in the decree, being the tract described in the 1863 location, Tract 1 on our diagram.

We have heretofore shown that Robinson deraigned his title under deed from Christopher E. Hawley, and that Hawley deraigned his title under a deed from John S. Watts. We have further shown that the deed from Watts to Hawley, and the deed from Hawley to Robinson, conveyed, and only purported to convey, the tract of land described in the 1866 location.

Robinson did not himself have title to the tract described in the 1863 location, and therefore could not

convey the northern half of that tract to Powhatan W. and James E. Bouldin, and for the same reason, namely, that Christopher E. Hawley himself did not have title in the tract described in the 1863 location, he could not convey the northern half of that tract to Robinson.

Therefore, not only did the deed from Robinson to Powhatan W. and James E. Bouldin not convey, or purport to convey, the northern half of the tract described in the 1863 location; but even if it is held that he did, then that deed would not have conveyed the northern half of that tract, for the reason that the grantor, Robinson, and his grantor, Hawley, had no title thereto .

We call attention of the court to the fact that no part of the north half of the tract described in the 1863 location, Tract 1, is situate within the limits of the tract described in the 1866 location, or what we call "the overlap," as an inspection of the diagram in this brief, and of Defendants Wise Exhibit 34, clearly shows. Therefore, the defendants Bouldin have no interest whatsoever in any part of the tract described in the 1863 location, being the tract described in the decree herein, and no interest in the "overlap."

We submit that the lower court erred in its decree adjudging said defendants Bouldin to have any interest whatsoever in the tract of land described in said decree; and this part of said decree should also be reversed.

ASSIGNMENT OF ERROR III.

The court erred in decreeing plaintiffs to be the owners of an undivided 18-19 interest in the south half, and defendants Bouldin to be the owners of an undivided 18-19 interest in the north half, of the tract described in the decree, for the reason that both plaintiffs and defendants Bouldin deraign their title by mesne conveyances from Christopher E. Hawley, and the said Hawley never owned more than an undivided 13-19 interest in either the tract described in the 1863 location or in the 1866 location.

The point involved in this assignment of error is as to the **amount**, or **quantity of interest**, if any, owned by the plaintiffs and defendants Bouldin, in the tract described in the decree.

As heretofore shown, the plaintiffs and defendants Bouldin, by mesne conveyances, deraign their title from Christopher E. Hawley.

Christopher E. Hawley deraigns his title under a quitclaim deed executed to him by John S. Watts on January 8, 1870.

We claim that on January 8, 1870, when John S. Watts executed this quitclaim deed to Hawley, he himself did not own more than an undivided 13-19 interest in the tract of land which he so quitclaimed, whatever tract that be held to be.

The reason Watts did not own more than an undivided 13-19 interest at that date, was because, at that time, he had only acquired that amount of interest from the heirs of Luis Maria Baca.

Two deeds were executed to John S. Watts prior to his deed to Hawley, each of said two deeds being dated May 1, 1864.

One was from Quirina Baca, Guadalupe Baca and husband, Paulina Baca, Martina C. de Baca and Romalda Baca, all children of Miguel Baca, who was a son of Luis Maria Baca, Plaintiffs Exhibit D, Tr. p. 164. The same children joined in the other deed to Watts, so there is no question in this case but that the interest of the deceased son, Miguel Baca, being an undivided 1-19 interest, was conveyed to John S. Watts, and this deed need not be further considered.

The other deed, executed May 1, 1864, is the deed which plaintiffs claim conveys the interest of all the heirs of Baca to John S. Watts, Plaintiffs' Exhibit C, Tr. p. 154.

We assert that this deed does not convey the interest of the following five children of Luis Maria Baca, to-wit:

1. Domingo Baca,
2. Josefa Baca y Sanchez,
3. Felipe Baca.
4. Jesus Baca y Lucero 1st.

5. Jesus Baca y Lucero 2nd.

And as these heirs owned an undivided 1-19 interest each, 5-19 in all, Watts did not acquire their 5-19 interest by the deed executed to him on May 1, 1864.

The original Luis Maria Baca was married three times and had nineteen children, named as follows:

1. Antonio Baca, also known as Jose Antonio Baca.
2. Luis Baca.
3. Prudencio Baca.
4. Jesus Baca 1st, also known as Jesus Baca y Lucero 1st.
5. Jesus Baca 2nd, also known as Jesus Baca y Lucero 2nd.
6. Felipe Baca.
7. Domingo Baca.
8. Manuel Baca.
9. Josefa Baca, also known as Josefa Baca y Salas.
10. Josefa Baca y Sanchez.
11. Juan Antonio Baca.
12. Jose Baca.
13. Jose Miguel Baca.
14. Ramon Baca.

15. Mateo Baca.
16. Guadalupe Baca.
17. Altagracia Baca.
18. Rosa Baca.
19. Juana Paula Baca.

Of the above nineteen children, Antonio died before his father, leaving an heir, who dying left heirs. The 1-19 interest inherited by the heirs of this son Antonio was never conveyed to John S. Watts, but was conveyed by mesne conveyances, to Joseph E. Wise and Margaret W. Wise, this being the particular 1-19 interest that is not involved in the present appeal of Wise.

The grounds upon which we assert that the five children of Luis Maria Baca, just named, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st and Jesus Baca y Lucero 2nd did not convey to Watts their interest under this deed, are as follows:

1. DOMINGO BACA.

Because, though he is recited as a grantor and did sign the deed, the deed itself recites that he had theretofore conveyed his interest to Francisco Baca. The record in this case shows this to be a fact; for plaintiffs themselves introduced in evidence a deed, dated the 9th day of February, 1863, a year prior to the date of the deed of May 1, 1864, wherein Domingo Baca and wife did

convey all their interest in the lands in dispute to Francisco Baca; this deed is plaintiffs' Exhibit G, Tr. p. 173.

Francisco Baca, the grantee of Domingo Baca, **did not sign** the deed of May 1, 1864, aforesaid. Therefore, this deed, although signed by Domingo Baca, did not convey to John S. Watts the 1-19 interest inherited by the son, Domingo Baca, for the reason that Domingo Baca had prior thereto conveyed this interest to Francisco Baca; and the said Francisco Baca, his grantee, did not sign or execute said deed.

2. JOSEFA BACA Y SANCHEZ.

In the body of the deed of May 1, 1864, "Josefa Baca y Sanchez, daughter of Luis Maria Baca, and wife of Juan Luis Montoya," is recited as one of the grantors.

She did not sign or execute the deed; nor did anyone sign or execute it for her, as her attorney in fact.

The deed is signed "Tomas C. de Baca, attorney in fact **for the heirs** of Josefa Baca y Sanchez. Tr. p. 160.

As the deed recites that Josefa Baca y Sanchez herself is the grantor, it could not be her deed, unless it was signed by her, or by her attorney in fact.

Tomas C. de Baca does not purport to sign as her attorney in fact. He signs as attorney for her heirs. Therefore the deed is not the deed of Josefa Baca y Sanchez. It was not executed by her, and John S. Watts did not acquire under this deed, the 1-19 interest inherited by the daughter Josefa Baca y Sanchez.

3. FELIPE BACA.

Felipe Baca is not recited as a party grantor in the deed; nor are his heirs or children recited as grantors, nor any one claiming as a grantee under him or them. The deed recites:

“Know all men by these presents: That we (here follow the names of each and all of the grantors), have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, etc., Tr. p. 154.

Such a deed does not convey the interest of one who is not named as a grantor, for, on the face of it, it only is the deed of those who are named therein as grantors.

In the deed, amongst other grantors named, is “Felipa Baca, wife of Jose Baca, deceased, son of Luis Ma. Baca.” This Felipa Baca was a woman and a child of a deceased son of Luis Maria Baca. She was not the same person as Felipe Baca, who was the son of Luis Maria Baca. The deed contains a signature “Felipe Baca,” evidently the signature of Felipa Baca, the granddaughter aforesaid.

There is no recital in the deed anywhere that the person who signed the name “Felipe Baca” was the particular Felipe Baca who was the son of Luis Maria Baca.

If the court assumes that the signature to the deed “Felipe Baca” was the signature of the Felipe Baca who was a son of Luis Maria Baca, then arises the question: Is a deed which recites the names of all of

the grantors, who purport to convey, the deed of one who in the deed is not named as a grantor, and who does not purport to convey, if his name be signed to the instrument.

A deed, like any other instrument in writing, is to be construed according to the words contained in the body of it. If the deed itself does not in any way purport to convey the interest of one who is not named therein, and who is not in any way referred to, we submit that it cannot be construed to be the deed of such person, even if the court does find that the signature "Felipe Baca" is presumed to be the signature of that particular Felipe Baca who was the son of Luis Maria Baca, and not the signature of Felipa Baca, the granddaughter.

If a deed recites "we, John Smith and Mary Smith his wife, have sold and conveyed, and by these presents do sell and convey to John S. Watts, certain described property," and one William Jones affixes his signature to the deed, does such a deed convey the interest that William Jones may have in the property described? We think not, for the reason that in the body of the deed itself, which is the contract of the parties, William Jones does not purport to convey anything. Therefore, the deed of May 1, 1864, did not convey, or purport to convey, the 1-19 interest of the son Felipe Baca.

4. JESUS BACA Y LUCERO 1ST.

The deed of May 1, 1864, also recites, amongst other grantors, the following: "I Jesus Maria Cabeza de

Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st, as appears by deed of said Jesus Baca y Lucero 1st and Maria Rafael Armijo, his wife, executed the 20th day of August, 1861, and recorded in the record book Letter D, pages 12 and 13, of the Register of Deeds for Santa Ana County," etc.

The deed is signed "Tomas C. de Baca, attorney in fact for the heirs of Jesus Baca y Lucero 1st." Neither Jesus Baca y Lucero 1st, nor his heirs, are recited in the body of the deed as grantors; nor is Tomas C. de Baca recited as the attorney in fact either for Jesus Baca y Lucero 1st, or for his heirs. Therefore, this deed cannot be construed as being the deed of Jesus Baca y Lucero 1st or his heirs.

The deed is also signed "Jesus Maria Baca, purchaser of the interest of Jesus Baca y Lucero 2nd." The ancestor, Luis Maria Baca, had two sons, each named Jesus Baca y Lucero; one was called Jesus Baca y Lucero 1st, and the other Jesus Baca y Lucero 2nd, being the children (4) and (5) in the list of the above nineteen children of Baca, heretofore set forth.

If the court construes this Jesus Maria Baca, who is the purchaser of the interest of Jesus Baca y Lucero, to be the same person who in the deed is recited by the name of Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st; or if the court disregards as surplusage the statement affixed to the signature of Jesus Maria Baca, to-wit, "the purchaser of the interest of Jesus Baca y Lucero 2nd," then

the deed would be good as a conveyance of the interest which Jesus Maria Cabeza de Baca had purchased from Jesus Baca y Lucero 1st.

It is a fact, in evidence in the case, that Jesus Baca y Lucero and Maria Rafael Armijo, by deed dater August 20, 1861, did convey to Jesus Maria C. de Baca, all their interest in the lands of Luis Maria Cabeza de Baca, deceased. Plaintiffs' Exhibit H, Tr. p. 174.

As this deed of date August 20, 1861, is recited in the deed of May 1, 1864, as the deed under which Jesus Baca y Lucero 1st and wife had conveyed their interest to Jesus Maria Cabeza de Baca, it would seem that Jesus Baca y Lucero 1st had conveyed his interest to Jesus Maria Cabeza de Baca, and that said Jesus Maria Cabeza de Baca, in signing his name as "Jesus Maria Baca," to the deed of May 1, 1864, did convey the interest, he so acquired, to John S. Watts.

We have deemed it necessary, however, to call attention to this by assigning it as an error, for the reason that a consideration of the foregoing facts must be made in order to understand the objection that we made to the deed as a conveyance of the interest of the other son, Jesus Baca y Lucero 2nd.

If the court does find from the foregoing consideration, that the deed of May 1, 1864, was good as a conveyance of the 1-19 interest inherited by Jesus Baca y Lucero 1st, and by him conveyed to Jesus Maria Cabeza de Baca, then the court would further find that the deed of May 1, 1864, conveyed to John S. Watts a total of

14-19 interest, instead of a total of 13-19 interest, as heretofore claimed by us.

5. JESUS BACA Y LUCERO 2ND.

We have just called attention to the fact that the original Luis Maria Baca had, amongst his nineteen children, two sons, one named Jesus Baca y Lucero 1st, and the other named Jesus Baca y Lucero 2nd.

Jesus Baca y Lucero 2nd is not named as a grantor in the deed of May 1, 1864; his heirs are not named as grantors, nor is anyone named as his or their grantee. The deed itself is not signed by Jesus Baca y Lucero 2nd; or by his heirs; or anyone who purports to be either his attorney in fact, or the attorney in fact of his heirs.

As we have just shown, the deed is signed "Jesus Maria Baca, purchaser of the interest of Jesus Baca y Lucero 2nd; but we have further shown that the most that can be considered in regard to this signature is, that the signer, Jesus Maria Baca, signed it as the purchaser of the interest of Jesus Baca y Lucero 1st, which would make the deed good as a conveyance of the interest inherited by Jesus Baca y Lucero 1st.

But we submit, that under no process of construction or reasoning can this deed of May 1, 1864, be construed to convey the interest of Jesus Baca y Lucero 2nd, who was in no way a party to it, and who did not sign it.

If this court holds the deed of May 1, 1864, is good as a conveyance of the interest inherited by Jesus Baca

y Lucero 1st, and by him conveyed to Jesus Maria Baca, although signed "Jesus Maria Baca, purchaser of the interest of Jesus Maria Baca **2nd**," it cannot hold the deed also to be good as a conveyance of the interest of Jesus Baca y Lucero 2nd; for Jesus Maria Baca is recited as being the grantee of only one of these two Jesus Baca y Luceros.

Therefore, we submit, that the deed of May 1, 1864, did not convey the interest inherited by the following four children of Luis Maria Baca, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca and Jesus Baca y Lucero, making a total of 4-19 interest. And that the total quantity of interest acquired by John S. Watts, under the deed of May 1, 1864, was 14-19 interest, and no more. We waive the assignment of error as to one of the Jesus Baca y Luceros, because we think the deed good as to one of them.

The laws in force in the Territory of Arizona on May 1, 1864, when the above mentioned deed to Watts was executed, are contained in the Statutes of the Territory of New Mexico in force at that time, which laws, by Act of Congress of February 24, 1863, creating the Territory of Arizona, provides that the laws of New Mexico shall be extended over the Territory of Arizona until changed by its own legislative enactment. And the legislature of Arizona did not enact a new code of laws until November 19, 1864, when it adopted what was known as the "Howell Code." The Statute of the Territory of New Mexico in regard to conveyances, was as follows:

“Sec. 1. Any person or persons or body politic holding, or who may hold, any right or title to real estate in this Territory, be it absolute or limited, by possession, in part payment, or transfer, may convey the same in the manner and subject to the restriction prescribed in this Act.

“Sec. 4. All conveyances of real property shall be subscribed by the person transferring his title or interest in said real property, or by his legal agent or attorney.

“Sec. 5. Every instrument in writing by which real estate is transferred or affected, in law or in equity, shall be acknowledged and certified to in the manner hereinafter prescribed.”

Act of January 12, 1852. Set forth in Compiled Laws of New Mexico of 1865.

The foregoing provisions, requiring a conveyance of real estate to be in writing, signed by the party, has ever since been the laws of Arizona, made so by subsequent legislative enactment.

The deed of May 1, 1864, which we have been considering, is an ancient deed, being more than 30 years old. 2 Corpus Juris, p. 1136. Dodge vs. Briggs, 27 Fed., pp. 160-170.

And being an ancient instrument, is admissible in evidence without direct proof of its execution. 17 Cyc. 433.

Upon the trial of this case defendants Wise objected to the introduction in evidence of this deed of 1864, as the deed or conveyance of each of the five children above named. The objection was overruled and exception taken. Assignment of Error IV.

The purpose of the objection, at the time, was to direct the attention of the court and counsel to the fact that this deed was not good as a conveyance of the interest of any of said five named children of Luis Maria Baca, except, perhaps, the interest of Jesus Baca y Lucero 1st. But that it was absolutely incompetent as evidence of a conveyance of the interest of the other four children, to-wit: Domino Baca, Josefa Baca y Sanchez, Felipe Baca and Jesus Baca y Lucero 2nd.

Now, John S. Watts, on January 8, 1870, executed his quit claim deed to Christopher E. Hawley, heretofore considered. Tr. p. 193.

Thereafter and on May 30, 1871, the interest inherited by the five children of Luis Maria Baca, above named, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st and Jesus Baca y Lucero 2nd, was duly conveyed to John S. Watts. The deed is plaintiff's Exhibit O, Tr. p. 197.

Here then arises the question, whether or not the title to the 4-19 interest acquired by John S. Watts under this deed to him of date May 30, 1871, inured to the benefit of Christopher E. Hawley, his grantee in the prior quitclaim deed of January 8, 1870.

And being an ancient document, the recital of facts therein are presumed to be true without proof, not only as against parties to the deed, but also as against strangers. *Deery's Lesse vs. Cray*, 5 Wall., 795-808, 17 Cyc. 444.

“The fact that an instrument is an ancient document does not, however, affect its admissibility in evidence, further than to dispense with proof of its genuineness, where it is otherwise admissible.”
17 Cyc. 444.

“The doctrine of admitting ancient documents in evidence without proof of their genuineness is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more inadmissible on that ground than if it were a newly executed instrument.”

Greenleaf Ev., Secs. 21, 142, 155, 576.

King vs. Watkins, 98 Fed., 913-925 (Above quotation from p. 917.

Therefore, although the deed of 1864 is an ancient document, nevertheless, the question as to whether or not by its terms the interest of the five heirs mentioned was conveyed therein or thereby to John S. Watts, is to be determined by the same rules of construction which apply to a deed executed yesterday.

The lower court held that it did; and this we claim is error.

A consideration of this question is necessary, for the reason that whatever interest the plaintiffs and defendants Bouldin acquired, was acquired under mesne conveyances from Christopher E. Hawley; and if Hawley only acquired a 13-19 interest, or, (since we concede the 1864 deed to be a good conveyance of the 1-19 interest inherited by Jesus Baca y Lucero 1st), a 14-19 interest of whatever lands were quitclaimed to him by John S. Watts, then that is all the interest that has been acquired by plaintiffs and defendants Bouldin, his mesne grantees, to either the 1863 or 1866 location.

If this court holds that the property quitclaimed by Watts to Hawley was the 1863 location, then all that Hawley acquired in that tract, under his deed from Watts, was an undivided 14-19 interest to the tract described in the 1863 location.

On the other hand, if this court holds that the property quitclaimed by Watts to Hawley is the tract described in the 1866 location, then all that Hawley acquired under the deed from Watts was an undivided 14-19 interest in and to the overlap, being that part of the 1863 location which is included within the limits as bounded and described in the deed, and plaintiffs, as mesne grantees under Hawley, are the owners of no more than this undivided 14-19 interest in said overlap.

The question, then, as to whether or not the 4-19 interest, acquired by Watts in 1871, inured to the benefit

of Hawley, is necessary to be decided, no matter how this Honorable Court may decide the question of description.

The deed from Watts to Hawley was a quitclaim deed.

The operative words in the deed from Watts to Hawley of January 8, 1870, are: "remise, release and quitclaim" with no other words of grant or conveyance whatsoever, and no covenant of title. Tr. p. 193-194.

"Quitclaim deeds contain usually, as their operative words, 'remise, release and forever quitclaim.'" Tiedeman on Real Property, Sec. 781, p. 732-3. 9 Am. and Eng. Ency. of Law, p. 137.

Wholey v. Cavanaugh, 88 Cal. 134-135.

"A quitclaim deed only passes that interest which the grantor had at the time of the conveyance, . . . and should the grantor subsequently acquire the title, no estoppel arises against him in favor of the grantee to prevent his enforcement of the title."

Tiedeman on Real Property, Sec. 781, p. 732-3.

"A quitclaim deed does not pass any more title than the grantor has."

May v. LeClair, 11 Wall, 232; 20 L. ed. 50.

In that case the court said, in speaking of a quitclaim deed:

"In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the

grantor could lawfully convey.”

May v. LeClair, *supra*.

“Accordingly a quitclaim deed will not estop the grantor from setting up a title subsequently acquired by him.”

16 Cyc. 693, and authorities there cited.

Without citing further authority we feel justified in saying that it is established law, that after-acquired title does not inure to the benefit of the grantee in a quitclaim deed, unless some positive statutory provision so prescribes.

The statute of Arizona, on the subject of after-acquired title, in force in 1870, when the deed from Watts to Hawley was executed, is found in the Howell Code, which went into effect the 20th day of April, 1865. The statute is as follows:

“Sec. 33. If any person shall convey any real estate, by conveyance, purporting to convey the fee simple absolute and shall not, at the time of such conveyance, have the legal estate in such conveyance, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance.”

Howell Code, Chap. XLII, Sec. 23, p. 279.

The same Section is also contained in Compiled Laws of Arizona of 1877, Section 2277, p. 384.

The foregoing statute, so in force in Arizona in 1865, and thereafter and in 1870, is the same, word for word, as the California statute on the same subject, being Sec. 33 of the California Acts of 1850, p. 252.

Before Arizona adopted this statute from California, the Supreme Court of California, in a number of cases, decided that a quitclaim deed was not a conveyance purporting to convey "a fee simple absolute," and after-acquired title did not inure to the benefit of a grantee in a quitclaim deed.

In the case of *Morrison v. Wilson*, 30 Cal. 344, decided October, 1866, the California statute is quoted in full.

In that case the question was, whether or not, under the foregoing statute, a deed was a quitclaim deed or was a conveyance purporting to convey the property in fee simple absolute.

The deed in question recited that the grantor "has granted, bargained, sold and hereby conveys to the said Minor, his heirs and assigns, a fifty vara lot in the City of San Francisco, known" (here comes description) "with all its appurtenances, thereto belonging. to have and to hold to the said Minor, his heirs and assigns free from claims of said Perkins or his heirs; and the said Perkins covenants he has done no act to encumber or injure the title thereof. **It is fully understood as to title this is only a quitclaim deed.**"

The court said: "The first question is whether the

deed by Perkins to Minor 'purports' to convey the lot in controversy 'in fee simple absolute.' ”

“The first clause in the deed bearing upon the question shows a bargain and sale of the lot and, taken by itself, would establish beyond dispute that the intention was to convey in full property. But in view of the clause with which the deed concludes, it is manifest to our judgment that the parties intended a quitclaim only.”

And the court held, that being a quitclaim deed, it did not convey the subsequently acquired title of the vendor.

In the case of *Quivey v. Baker*, 37 Cal. 465-472, decided in 1869, the court held:

“The principal that a title acquired by the vendor after a conveyance by him in fee inures to the benefit of his vendee, does not apply when the vendor's deed was a quitclaim, even if it contains a qualified warranty against a specified adverse claim set up by a third party.”

In the case of *McDonald v. Edmunds*, 44 Cal. 328, the court said:

“The conveyance by the defendant to the plaintiff of the 400 acres, including the premises in controversy, was by a quitclaim deed. It has been repeatedly decided by this court that a conveyance of a quitclaim deed does not preclude the grantor from afterwards acquiring and holding for his own use the true title to the land.

McDonald v. Edmunds, 44 Cal. 328.

Also *Anderson v. Yoakum*, 94 Cal. 227.

Cadiz v. Majors, 33 Cal. 288.

Sullivan v. Davis, 4 Cal. 291-293.

The most conclusive case on this point is the case of *Field v. Columbet*, 4th Sawy. 523, Fed. Cases, 4764, decided by Mr. Justice Field sitting on the Circuit, in July, 1864.

In that case Mr. Justice Field said:

“The only practical difference in deeds in use in this state,” (California) “arises from their operation under the statute upon subsequently acquired interest, or from the covenants implied by the particular terms.

“The quitclaim deed only passes such interest as the grantor possesses at the time, and has no operation whatever upon subsequently acquired interest. By its execution, the grantor does not affirm the possession of any title, nor is he precluded from subsequently acquiring a valid title and holding it for his own benefit. Subsequently acquired title does not inure in any respect to the benefit of the grantee in the quitclaim; and herein lies its distinction from the deed in fee simple absolute under the statute or the deed with covenants.”

Field v. Columbet, 4 Sawyer, quoting from p. 528.

As the statute of Arizona in force in 1870, when the quitclaim deed from Watts to Hawley was executed, was

adopted from the statute of the State of California, Arizona adopted at the same time the construction placed upon that statute by the Supreme Court of California. Such is the well-established rule of construction, announced by the Supreme Court of the State of Arizona, in repeated decisions:

“Where the territory has adopted a statute of another state, which has been construed by decisions of that state promulgated before it was enacted by this territory, such construction is also adopted.”
Territory v. Delinquent Tax List, 3 Ariz. 117; 21 Pac. 768.

Cheda v. Skinner, 6 Ariz. 196; 57 Pac. 64.

Goldman v. Sotelo, 8 Ariz. 85; 68 Pac. 558.

Elias v. Territory, 9 Ariz. 1; 76 Pac. 605.

“The adoption of a statute from another state adopts with it the construction placed upon it by the Supreme Court of that State at the time of such adoption.”

County of Santa Cruz v. Barnes, 9 Ariz. 42.

Costello v. Muheim, 9 Ariz. 422; 84 Pac. 906.

Murphy v. Brown, 12 Ariz. 268; 100 Pac. 901.

It therefore is clear, under the laws of the Territory of Arizona in 1870, when the Watts to Hawley quitclaim deed was executed, that the deed, being a deed of quitclaim, did not purport to convey a fee simple absolute,

and therefore the title after acquired by Watts did not inure to Hawley under his quitclaim deed.

This after-acquired title, being the undivided 4-19 interest of those heirs of Baca who had not conveyed to Watts in the deed of 1864, descended to the heirs of John S. Watts, upon his death, he never having executed any deed, prior to his death, other than the quitclaim deed to Hawley.

In order to escape this inevitable conclusion, appellees contend that the deed from the heirs of Baca to Watts, of date 1871, was a ratification and confirmation of the title conveyed to Watts by the deed of May 1, 1864, and for that reason, under the doctrine of relation, it made valid whatever defect there was in the deed of May 1, 1864; on the theory that a principal can ratify the act of his agent, which ratification makes valid the act at the date of its commission.

We will consider this contention of appellees.

The deed of 1871 from the heirs of Baca to Watts first purports to be a grant, bargain and sale deed, with covenants of warranty of a tract of land situate in northern Arizona, known as Location No. 5 of the Baca series, and has nothing whatsoever to do with the lands in dispute in this action. After the habendum and covenants of this deed, the heirs who execute the same, by Tomas C. de Baca, their attorney in fact, have inserted the following provision: "And the said heirs of Luis Maria Baca, above mentioned, now ratify and confirm the title

made by us, and by our attorney, Tomas Cabeza de Baca to John S. Watts, his heirs and assigns, on the first day of May, 1864, for the lands described in. Location No. 3, situate in Arizona Territory, containing each 99,289 and 39-100 acres, the boundaries of which are set forth and described in the deed; and the said heirs of said Luis Maria Baca deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described.”

Witness our hands and seals, etc.

Plaintiffs' Exhibit O, Tr. p. 197—quoting on p. 202.

The first sentence above is a ratification and confirmation of the title made by those of the signers, or their attorney in fact, **who executed the deed of May 1, 1864.**

As to any of them who did not execute that deed, it was not his deed, and could not be ratified or confirmed.

As said by the Supreme Court of California on this subject:

“A confirmation is a contract by which an act that was voidable is made firm and unavoidable. It necessarily implies a prior voidable act. A deed is an instrument in writing, sealed and delivered; without a delivery the writing is not voidable but is void—a mere nullity.

It was a misapplication of terms to say that the parties desired to confirm the grant, for one of the parties to the second deed was not a party to the first; the first deed was not a grant; If the second deed was of any force it derived its value from its own execution and delivery.”

Barr v. Schoeder, 32 Cal. quoting on p. 616-617;

also Branham v. Mayor, 24 Cal. 585.

Duvlin on Deeds, Vol 1. 2nd. Ed. Sec. 17.

If then, the deed of May 1, 1864, was void as to Francisco Baca, the grantee of Domingo Baca, because he did not execute it; his subsequent execution of the deed of 1871 could not possibly ratify or confirm what he did not do at all in 1864; namely: execute the deed of that date.

Also as to Josefa Baca y Sanchez. She never signed the deed of 1864. It was not her deed at all. She conveyed no title by that deed, and therefore, neither she, nor her heirs could ratify or confirm a title which they never had made. Their deed could only have effect from the date it was executed, and that was in 1871.

This also applies to Felipe and to Jesus Baca y Lucero the 2nd, neither of whom conveyed, or purported to convey, any title whatsoever, in the 1864 deed.

To quote again from the case of Barr v. Schoeder, supra:

“The first deed having omitted the name of the intended grantee, the transmission of the title to the plaintiff must of necessity depend upon the second deed in which he is described.”

“An attempt to confirm a void deed, so as to make it operative, may fail to effect that purpose, but may still operate as a new grant.”

Chester v. Breitting, 32 S. W. 527, 88 Tex. 586.

Due v. Howland, 6 Cow. 277.

Jackson v. Stevens, 16 Johns 110.

Barr v. Schweder, 32 Cal. 609.

In so far as the deed from the Baca heirs to Watts of 1864 was void as to certain of the heirs, by reason of the fact that those heirs, or their grantees, did not sign it, it could not be ratified or confirmed by the subsequent deed of 1871. That subsequent deed was a new conveyance, and whatever interest or title was conveyed thereby could only date from the date of the deed itself, it could not date back by relation to the deed of 1864 which was void as to those who did not execute it.

Therefore, the words of ratification and confirmation contained in the deed of 1871, did not vest in John S. Watts anything more than a new title to said 4-19 interest, having its origin at the date of the signing of this deed.

Again the following clause in the deed of 1871, to-wit:

“and the said heirs of the said Luis Ma. Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described.”

shows conclusively that this deed was a new conveyance from Baca heirs to Watts, quitclaiming to him, on the date of the execution of that deed, all their right in the property described in the deed of 1864, and nothing more.

We think it clear that the title which John Watts acquired by the deed of May 30, 1871, was an entirely new title, so far as the undivided 4-19 interest is concerned, which was not theretofore conveyed to him by the deeds of May 1, 1864.

And if the title of John S. Watts to this 4-19 interest was only vested in him by the deed of May 30, 1871, then that interest did not inure to the benefits of Hawley, as grantee under the quitclaim deed of 1870.

Therefore, the only title that Hawley acquired under the quitclaim deed executed to him by John S. Watts on January 8, 1870, was the title which John S. Watts himself then had, namely, an undivided 14-19 interest in the tract of land described in that deed. The other 4-19 interest, thereafter acquired by John S. Watts, did not inure to the benefit of Hawley, but upon the death of Watts, passed to his heirs.

If the tract of land described in the deed to Hawley is by this Court held to be the tract described in the 1866 location, then Hawley acquired by that deed an undivided 14-19 interest in the overlap. And that is what plaintiffs acquired under the various mesne conveyances from him.

On the other hand, if this court holds the tract described in the deed to Hawley to be the tract described in the 1863 location, being the tract described in the decree herein, then Hawley acquired by that deed an undivided 14-19 interest in said lands, and no more. And that is all the interest that plaintiffs and defendants Bouldin could possibly acquire, by mesne conveyance from Hawley.

In either event, the decree of the lower court, adjudging plaintiffs and defendants Bouldin to have acquired, as such mesne grantees, an undivided 18-19 interest in any part of the lands described in the decree, is erroneous, and should be reversed.

ASSIGNMENT OF ERROR IV.

The court erred in overruling the objection of defendant Wise to the introduction in evidence by plaintiffs of the deed of May 1, 1864, from certain heirs of Baca to John S. Watts, insofar as said deed pretended to be executed by, or to be the deed of, the following heirs of Baca, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st, and Jesus Baca y Lucero 2nd

The deed above referred to is the deed which we have considered in the foregoing assignment of error III; and what was there said is also applicable to this assignment of error IV.

This deed, Plaintiffs Exhibit C, being competent evidence as to those heirs of Baca who did execute it, was properly received in evidence to show the deraignment of plaintiffs' title from them. But at the time the deed was offered, and in order to direct the attention of the court and counsel to the fact that it was not the deed of the five, or at least four, of the heirs above mentioned, we objected to its admission in evidence as a deed or conveyance of the title of those specified heirs. Our objection was overruled and exception taken.

For the reasons heretofore stated, in consideration of Assignment of Error III, the court may well hold that this deed is good as the deed of Jesus Baca y Lucero 1st; but we urge that it is not the deed or valid conveyance of the interest of the other four named heirs, and there-

fore John S. Watts did not acquire their interest, being an undivided 4-19 interest, under the deed of May 1, 1864.

RESUME OF ASSIGNMENTS OF ERROR, I, II, III AND IV.

We have now considered the first four assignments of error, which directly raise the question as to what title plaintiffs and defendants Bouldin have in the property in dispute.

We have shown that defendants Bouldin have no title whatsoever to any part of the tract of land described in the decree; and we have further shown that plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, have no interest in the tract of land described in the decree, except an undivided interest, less than 18-19 interest, in what we call the overlap, being a tract containing about 6,000 acres. We will hereafter show that under the evidence in this case the 18-19 interest in the tract of land described in the decree, exclusive of the overlap, and the 4-19 interest in the overlap, is owned by Joseph E. Wise, Santa Cruz Development Company and the Intervenors, in the proportions hereinafter set forth; and that the lower court should have so decreed.

ASSIGNMENTS OF ERROR V, VI AND VII.

The Court erred, after admitting in evidence deed from the heirs of John S. Watts to David W. Bouldin, dated September 30, 1884, conveying to Bouldin an undivided 2-3 interest in the lands described in the decree, subject to the following objection of plaintiffs, to-wit: That the deed from said John S. Watts to Christopher E. Hawley, of date January 8, 1870, conveyed full title to Hawley, said heirs had no title and nothing to convey; in thereafter sustaining said objection.

As heretofore stated, the heirs of John S. Watts inherited all the interest in said lands which had not been by John S. Wise quitclaimed to Hawley, in the deed of January 8, 1870.

Appellant, Joseph E. Wise, offered in evidence the deed from said heirs to David W. Bouldin, of date September 30, 1884, conveying to him an undivided 2-3 interest of all their interest in the lands described therein, including the tract of land described in the 1863 location. Defendants Wise Exhibit 16, Tr. p. 272. Plaintiffs and defendant Santa Cruz Development Co., objected thereto. The court overruled the objection and objectors excepted.

Defendants Wise then offered in evidence a certified copy of the first record of said deed, said record having been made prior to the deed being acknowledged. Plaintiffs and Santa Cruz Dev. Co. objected thereto on the grounds heretofore set forth, to the introduction of De-

fendants Wise Exhibit 16, and made further objection that the paper was not entitled to record, the same being acknowledged, and that there is no proof of its execution exemplified copy of an unacknowledged paper. This paper was received in evidence subject to said objection, and marked Defendants Wise Exhibit 17, Tr. p. 282.

It therefore appears in the record that Wise offered in evidence the deed of September 30, 1884, after it was acknowledged and recorded, being Defendants Wise Exhibit 16. Tr. p. 272. and that he also offered in evidence a certified copy of the first record of the deed, it having been recorded before it was acknowledged, said certified copy being Defendants Wise Exhibit 17, Tr. p. 282.

Now, after plaintiffs and defendants Wise had rested, the court heard argument upon the construction of the deed from John S. Watts to Hawley, of 1870, and after that argument ruled, that this deed conveyed to Hawley full title to the tract described in the 1863 location, and that the title thereafter acquired by Watts in 1871, inured to the benefit of Hawley, his grantee under that deed. Tr. pp. 417-419.

The court having announced this ruling, as set forth on pp. 417-419 of the transcript, the following occurred, as set forth in the transcript, to-wit:

“The attention of the court was then called to the instrument of September 30, 1884 (Defendants Wise exhibit 17), received subject to the objections of the plaintiffs and the Santa Cruz Development

Company. The court now sustains the objections of the plaintiffs. Exceptions were duly taken by all the Wise defendants, the Ireland heirs (Intervenors) and Santa Cruz Development Company." Tr. p. 419.

As the objections made by the plaintiffs to the introduction of Defendant Wise Exhibit 17, which was merely a certified copy of the record of the deed from Watts' heirs to Bouldin, aforesaid, were different from the objections made to the deed itself after it had been acknowledged (Defendants Wise Exhibit 16), the foregoing ruling of the court, sustaining the objections of plaintiffs to Defendants Wise Exhibit 17, do not apply to Defendants Wise Exhibit 16; and said Defendants Wise Exhibit 16 is in evidence in this case, with the objection by plaintiffs overruled, and exception by plaintiffs taken to the ruling.

The defendant Santa Cruz Development Company also objected to the introduction in evidence of Defendants Wise Exhibit 16; but their objections were overruled, and they took exception at the time. Tr. pp. 281-282. And the court never did sustain their objections to either Exhibit 16 or Exhibit 17.

In view of the record in the matter, Defendants Wise Exhibit 16 is in evidence in this case.

Should this court not agree with us as to our views of the record, and hold that the subsequent ruling of the lower court did, in effect, sustain the objection of plaintiffs to Defendants Wise Exhibit 16, the objection

being on the ground that at the time the heirs executed it they had no title to convey; then we submit that this ruling is erroneous, and our exception thereto well taken, for the reason, as we have shown, that John S. Watts, at the time of his death, **did** have an interest in the lands described in the 1863 location, and his heirs inherited that interest, as we have heretofore shown; and the court erred in sustaining said objection.

As the Santa Cruz Development Company has taken a separate appeal in this case, and as it will urge the consideration of the objections made by it to the introduction in evidence of said deed from the Watts heirs to Bouldin; and as it will attack the validity of that deed upon the grounds set forth in its objections, we will consider each of the objections so made by the Santa Cruz Development Company, and will show each to be without merit. And we will further show that said deed was a good and valid conveyance, under which David W. Bouldin became vested with an undivided 2-3 of all the interest in Baca Float No. 3, according to the description of the 1863 location, which the heirs of Watts inherited from their ancestor, John S. Watts.

Argument upon the Deed from Heirs of John S. Watts to David W. Bouldin, of September 30, 1884, Defendants Wise Exhibit 16, Tr. pp. 272-281.

This deed was executed by the son, John Watts, for himself, and as attorney in fact for his mother and the other heirs.

The defendant Santa Cruz Development Company asserts that this deed is no deed, or void, for each of the following reasons:

1. That there is no proof of the authority of John Watts to execute the deed as attorney in fact for the other heirs.

2. That the deed does not recite the authority of John Watts to execute the same as attorney in fact for the other heirs.

3. That the law of Arizona in force when the deed was made required the power of attorney to be acknowledged.

4. That the deed was not properly acknowledged or proved.

5. That there was no consideration for the deed.

6. That the instrument is not a deed, but an executory contract to convey.

We will consider each of these objections, and show there is no merit in them whatsoever.

First point raised by Santa Cruz Development Company, to-wit:

That there is no proof of the authority of John Watts to execute the deed as attorney in fact for the other heirs.

The deed was executed in September, 1884. This

case was tried in March, 1915. The deed was then over 30 years old. It was an ancient document.

1 Ency. of Evidence, p. 860.

The deed does not, in the body of it, recite that Elizabeth A. Watts, by John Watts, her attorney in fact, executes the same, nor does it recite, in the body of it, that any of the other heirs, by John Watts, their attorney in fact, executed the same.

But, the deed is signed, "Elizabeth A. Watts, by attorney in fact, John Watts;" "J. Howe Watts, by attorney in fact, John Watts," and so on for each of the heirs.

Being an ancient deed, the power to execute it by the attorney in fact will be presumed.

"If an ancient paper shown to be otherwise competent recites an authority under which it purports to be executed, or recites facts equivalent to a power, the recital is **prima facie** evidence of the authority, provided the recital shows the principal's names, and provided also acts of ownership have been done under the instrument."

1 Ency. of Ev., 878, and authorities there cited.

"If there is no such recital and the paper appears to have been signed by one person on behalf of another, some evidence of authority must be produced."

1 Ency. of Ev., 879.

"But the contrary has been held as to deeds executed by attorneys in fact, deeds of community

property, of partnership property, and deeds executed by persons unable to write.”

1 Ency. of Ev., 879-880.

“The conveyance appeared to be more than 30 years old, and no objection was taken to its admissibility as an ancient instrument, except that the instrument in such cases is required to recite or purport, in the body of it, that it is made for and by authority of the owner. We think this is not indispensable, and that it is sufficient if such expression appear in the signature of the instrument, which is an essential part of a deed, and indispensable to give it any effect. That a deed signed ‘R. W. B. Martin, by his attorney John S. Martin,’ is sufficient to convey R. W. B. Martin’s title, if John S. Martin in fact held a power of attorney, although there be nothing in the body of the deed on the subject, is practically held in *Hill v. Conrad*, 91 Tex., 341; 43 S. W., 789. This being so, it must be held that an ancient instrument thus executed will authorize the authority to be presumed.”

Ferguson v. Ricketts (Tex. Civ. App.), 55 S. W., 975.

Note to Vol. 1, Ency. of Ev., p. 880.

“And where” (proof is) “required at all, slight evidence of authority will suffice.”

1 Ency. of Ev., p. 880.

Not only is the power of John Watts to execute the deed, it being an ancient instrument, presumed; but

John Watts himself, whose deposition was taken in the case, and is part of the evidence in the record, testified that he had written powers of attorney from all the heirs, authorizing him to execute the deed. (Testimony of Watts, Tr. pp. 283-312.)

John Watts, son of John S. Watts, residence Newton, Kansas, where his deposition was taken on behalf of appellant Wise, testified that he was 74 years old; that for 20 years he was a banker, and for 24 years in government service as a National Bank Examiner, National Bank Special and National Bank Receiver. Tr. p. 283. That he executed, on or about the 30th day of September, 1884, to David W. Bouldin, for himself individually and as attorney in fact for his mother, Elizabeth A. Watts, and for his brother, J. Howe Watts, and for his sisters, the instrument of date the 30th day of September, 1884, purporting to convey to David W. Bouldin, an undivided 2-3 interest of all their right, title and interest in the certain lands therein described; being the tract described in the 1863 location. Tr. p. 284.

He further testified, that before signing this deed, he had received from his brother and also from his mother and the other heirs, written authority authorizing him to execute the instrument, being general powers of attorney, one from his brother and the other from his mother and the other heirs. Tr. pp. 285-291.

To the question: "What is your recollection as to whether one or both of the instruments were in the form of a letter or in the form of a formal power of attorney?"

he answered: "I am not sure on that point. My impression is that I had both. First letters and then powers executed." Tr. p. 287.

He further testified:

"I am not able at this time to state whether or not the powers of attorney, that is the formal instrument, from my mother and all the other parties for whom I signed the instrument of September 30th, 1884, except my brother, were acknowledged before a notary or other officer authorized to take acknowledgments." Tr. pp. 286-287.

Q. Do you remember the contents of the instrument from your brother, J. Howe Watts, as to whether or not the instrument gave you authority to execute the instrument or deed, a certified copy of which is attached and marked "Defendants Wise Exhibit A?" A. "I think it was a general power of attorney." Tr. p. 288.

He further testified, referring to the powers of attorney, that they gave him authority to enter into, execute and deliver such deed or deeds or contracts or conveyances or other instruments, affecting the premises described in the deed of September 30, 1884; that the instruments contained such authority; that the powers of attorney were general in their terms. He could not recall, however, whether or not these powers of attorney were acknowledged.

He further testified, that James W. Vroom, being the same James W. Vroom who is now president of the defendant corporation, Santa Cruz Development Com-

pany, was his attorney in 1899, and had been his attorney, attending to various matters for him, for many years prior to that date. Tr. p. 296.

The Secretary of the Interior decided in July, 1899, that the 1866 location of Baca Location No. 3 was void, and that the claimants were bound by the 1863 selection.

Now, in October, 1899, a few months after this decision, the witness John Watts, for himself, and as attorney in fact for the other heirs of his father, executed to James W. Vroom, his attorney, a deed conveying to **him** an interest in the tract described in the 1863 location. Tr. p. 293.

Watts further testified that prior to executing this deed to Vroom he informed him that he had executed and delivered the prior deed to David W. Bouldin, of date September 30, 1884. He testified:

“I think I informed said Vroom of that fact both by letter and by conversation.” Tr. p. 294.

Q. Did you inform said Vroom any time prior to the execution of said quitclaim deed, dated October 25, 1899, that you had authority from Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, J. Howe Watts, A. L. Bancroft and Attorney Wardwell, to execute for them as their attorney in fact, the said instrument dated September 30, 1884, to the said David W. Bouldin?

A. “Yes sir.” Tr. p. 294.

Watts further testified that before executing the deed to James W. Vroom, on October 25, 1899, he delivered a great many papers to him, among others the power of attorney referred to. Tr. 296. On this point Watts testified as follows:

“Referring again to the power of attorney and letters which I have testified to, pursuant to which I executed the instrument to David W. Bouldin, under date of September 30, 1884, I will state that those papers were delivered to said James W. Vroom; I cannot give the exact date; it was before the execution of said quitclaim deed, dated October the execution of the deed dated October 25, 1899. I could not state definitely what papers were delivered to said James W. Vroom; a great many. Mr. Vroom was here in Newton, and examined personal papers of my father’s relating to the subject, and took such as he deemed material or important. My recollection is that he volunteered to place of record the powers of attorney from the parties in whose behalf I signed the said instrument to David W. Bouldin on September 30, 1884; that is, he promised me he would place such powers of attorney of record as were necessary.” Tr. pp. 295-296.

Mr. James W. Vroom did not take the stand as a witness in the case. He is the same gentleman who conveyed whatever interest he acquired from the heirs of Watts, to the defendant, Santa Cruz Development Company, by deed dated June 11, 1913. (Santa Cruz Development Company Exhibit 7, Tr. p. 412), and he is now the president of that corporation.

Demand was made by counsel for defendant Joseph E. Wise, upon James W. Vroom, who was admitted to be the President of the defendant Santa Cruz Development Company, that he produce the powers of attorney which the witness John Watts testified to in his deposition. To this demand James W. Vroom answered that he did not have the powers of attorney, or either of them, and never heard of said powers of attorney. Tr. p. 311-312.

However, in view of the sworn testimony of John Watts, and he has no interest in this suit and no occasion to misstate any fact; and in view of the fact that Mr. James W. Vroom did not submit himself as a witness in the case, to be examined and cross-examined under oath; and in view of the great interest of Mr. James W. Vroom in the case, he being the grantor, and President, of the defendant Santa Cruz Development Company; we think the evidence in this case shows that the written powers of attorney which John Watts had, authorizing him to execute the deed of 1884, were obtained by Mr. James W. Vroom, for the purpose of having the same recorded, and that he failed to record the same.

As hereafter we will show, the recording of these powers of attorney was not necessary, under the laws of Arizona, to authorize John Watts to execute the deed of 1884, as attorney in fact for his various principals; nor was it necessary to the validity of these powers of attorney that they be acknowledged. It was sufficient that they were in writing.

On this point, then, we submit: First, that as the deed executed by John Watts, as attorney in fact for the other heirs of his father, is an ancient deed, his power to execute the same is presumed; and second, that the positive testimony of John Watts himself proves that, as a matter of fact, he did have written powers of attorney from said heirs, authorizing him to execute said deed. There is no virtue therefore, in the first contention of defendant Santa Cruz Development Company.

Second point raised by Santa Cruz Development Company, to-wit: That the deed does not recite the authority to John Watts to execute the same, as attorney in fact.

The deed does not, in the body thereof, recite that John Watts is the attorney in fact for the various principals therein named; but it is signed, as heretofore stated, in the name of each principal "by attorney in fact John Watts." Thus, "Elizabeth A. Watts, by attorney in fact John Watts," and so on for each of the principals.

Under the authorities, this is the proper and approved method in which an attorney in fact should execute a deed for his principal.

"The best form for the execution of sealed instruments, as all others, is to put in the body of the instrument the principal's name, and to sign the name of the principal at the end with the agent's name below, preceded by the preposition 'by' and followed by the word 'agent.'"

31 Cyc., 417, and authorities there cited.

“A deed signed ‘A. B.’ (the name of the grantor) ‘by C. D., his attorney in fact’ sufficiently indicates that it was executed on the part of the grantor by an attorney in fact, although there is no recital of the fact in the deed itself.”

Tidd v. Rines, 26 Minn. 201, 2 N. W. 297.

Also authorities heretofore cited.

We submit there is absolutely no merit in this contention.

Third point raised by Santa Cruz Development Company, to-wit:

That the power of attorney was not acknowledged or recorded.

The evidence of John Watts himself shows, we think, that the powers of attorney to him were acknowledged. The fact that he gave them to James W. Vroom for the purpose of having them recorded would seem to indicate that they must have been acknowledged; but even if they were not acknowledged, nevertheless, under the laws of Arizona in force in the year 1884, when said deed was executed, acknowledgment of a power of attorney was not essential to its validity. The importance of this question must be our excuse for considering it at considerable length, particularly as it involves the construction of old statutes.

Sec. 2245 of Comp. Laws Ariz. 1877, (being the law in force in Arizona when the deed was executed), re-

quires every conveyance of land to be by deed, signed by the person, etc., and acknowledged or proved and recorded. This section is as follows:

“Sec. 2245. Conveyances of lands, or of any estate or interest therein, may be made by deed, signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as hereinafter directed.”

Sec. 2268 of Comp. Laws, 1877, provides that such conveyance is binding and valid between the parties without record. The section is as follows:

Sec. 2268. **Every conveyance** whereby any real estate is conveyed, or may be affected, proved or acknowledged, and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, **but shall be valid and binding between the parties thereto without such record.**”

Sec. 2270 of Comp. Laws, 1877, provides that any conveyance not so recorded is void as against any subsequent purchaser, in good faith and for a valuable consideration where his own conveyance shall be first recorded. The section is as follows:

“Sec. 2270. Every conveyance of real estate within this Territory, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the

same real estate or any portion thereof, where his own conveyance shall be first duly recorded.”

Sec. 2271 of Comp. Laws, 1877, requires powers of attorney to be acknowledged or proved, and recorded as **other conveyances**. The section is as follows:

“Sec. 2271. Every power of attorney, or other instrument in writing containing the power to convey any real estate as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any conveyance whereby any real estate is conveyed or may be affected, shall be acknowledged or proved, and certified and recorded **as other conveyances** whereby real estate is conveyed or affected are required to be acknowledged or proved, and certified and recorded.”

Sec. 2273 Comp. Laws, 1877, provides that every conveyance affecting real estate, so acknowledged or proved, may be read in evidence without further proof. The section is as follows:

“Sec. 2273. Every conveyance or other instrument, conveying or affecting real estate, which shall be acknowledged or proved and certified, as hereinafter prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof.”

Sec. 2274 Comp. Laws, 1877 provides that the term “conveyance” as used in the chapter includes “powers of attorney.” The section is as follows:

“Sec. 2274. When any such conveyance or instru-

ment is acknowledged or proved, certified and recorded in the manner hereinafter prescribed, and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence without further proof."

Under these statutes the Supreme Court of Arizona, in the case of *Charouleau v. Woffenden*, 1 Ariz., 243, held:

"No acknowledgment of deed is necessary to pass title to the property conveyed by it.

Deed though defectively acknowledged may be given in evidence as against the grantor, or any other party not a purchaser."

Charouleau v. Woffenden, 1 Ariz. 243 (1876).

Section 2247 supra, requiring all conveyances to be acknowledged or proved, is word for word the same as the statute in force in Montana.

In the case of *Taylor v. Holter*, 1 Mont. 688-712, decided in 1872, that court held:

"A deed which is not acknowledged or recorded is good between the parties."

In its decision in that case the Montana Court said (quoting from pages 710 and 711 of the decision):

“Our statute provides (section 3, p. 396): ‘Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved in the manner hereinafter provided.’

As between the parties a deed can be enforced without acknowledgment and without record. The acknowledgment is no part of the deed. The acknowledgment to a deed is no part of the deed, and as between the parties to the instrument a deed is good without acknowledgment and record being required for the protection and benefit of third persons.”

Taylor v. Holter, 1 Mont. 699-712.

In the case of McAdow v. Black, 4 Mont. 475, 1 Pac. 751, decided in 1882, that court held, under a statute identical with Sec. 2271 of Comp. Laws of Arizona of 1877, in regard to the acknowledgment and record of powers of attorney, that a power of attorney not acknowledged or recorded was valid as between the mortgagor and mortgagee.

The court on this point said:

“Neither was it necessary that this power of attorney should have been certified, acknowledged and recorded, to have made it good, as between the mortgagor and mortgagee in respect to the mortgage executed in pursuance thereof. The mortgage in question might have been enforced against Black, the mortgagee named therein. He could not have attacked the power of attorney because not acknowledged or recorded. In the case of Tay-

lor v. Holter, 1 Mont. 712, this court held that 'the acknowledgment to a deed is no part of the deed, and, as between the parties to the instrument, a deed is good without acknowledgment, the acknowledgment and record being for the protection of third persons.'

The same rule would apply to powers of attorney. The acknowledgment and record being for the protection of third persons,—that is, for the purpose of notice,—it follows that if third persons have actual notice, a deed or power of attorney, not acknowledged or recorded, would be good as to them in equity."

McAdow v. Black, 4 Mont. 475, 1 Pac. 751.

Again, Section 2276 Comp. Laws of Ariz. 1877 provides, that other proof than by acknowledgment, etc., can be made of a conveyance. The section is as follows:

"Sec. 2276. If the party contesting the proof of any such conveyance or instrument shall make it appear that any such proof was taken upon the oath of an incompetent witness, neither such conveyance or instrument, nor the record thereof, shall be received in evidence until established by other competent proof."

In 1864 California had the same statute. Landers v. Bouton, 26 Cal. on page 406.

The case of Landers v. Boulton, 26 Cal. 393-420, was an action to quiet title. The point was made that

the lower court erred in admitting in evidence a power of attorney under which a deed in the chain of title was executed, for the reason that as the acknowledgment of the power of attorney was void, the power of attorney itself was a nullity, under the statute. The court said:

“We have carefully examined the several sections of the Act, and are satisfied that a conveyance, as between the parties to it, is valid, and passes the title without acknowledgment or record. And this was the opinion of the Court in *Ricks v. Reed*, 19 Cal. 553. The acknowledgment is only the mode provided by law for authenticating the act of the parties, so as to entitle the instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence.”

The court then goes on to quote the statute of California, which is the same as Sec. 2276 of Comp. Laws of Ariz. 1877, *supra*, and says:

“Section thirty-one provides that neither the certificate of acknowledgment or of proof, shall be conclusive, but may be rebutted; and section thirty-two, that if it shall be made to appear ‘that any such proof was taken upon the oath of an incompetent witness, neither such conveyance or instrument, nor the record thereof, shall be received

in evidence **until established by other competent proof.'**

In such a case the certificate of acknowledgment or proof upon rebutting the **prima facie** case becomes a nullity, as being false or unauthorized, and the deed stands as if there was no certificate. But the deed is nevertheless good under the Act, and when 'established by other competent proof,' is authorized to be received. It is apparent from these several provisions of the Act, that the deed exists as a valid instrument without any acknowledgment or proof; but to entitle it to record, or to be read in evidence without further proof, it must be authenticated in the mode prescribed. (See also, Sections 18, 20.) It would be singular, indeed, if the Legislature should provide that certain proofs made *ex parte* and certified by any one of a large number of officers, should be sufficient to authorize an instrument in writing to be read as evidence of a conveyance of land, while the same proofs made in open court on the trial of a cause, with the benefit of cross examination, should be insufficient. The question, in our opinion, is one of preliminary proof. If acknowledged or proved in pursuance of the statute, the instrument is admissible without further proof. If not, it must be proved according to the ordinary rules of law applicable to the subject."

Landers v. Bolton, 26 Cal. 393-420.

The court, then, in the decision, shows that a different policy obtains in regard to the conveyances of married women. On this point the court says:

“With respect to the conveyances by married women in this and other States, referred to by counsel, a different policy prevails. For the purpose of protecting her against fraud, coercion and undue influence of any kind, the acknowledgment of the wife is made a part of the deed itself, or perhaps more properly speaking, an indispensable part of the evidence of its execution. To secure perfect freedom of action, the wife must be examined separate and apart from her husband, and even at the last moment the right of retracting is secured to her. It must appear in the certificate of acknowledgment that she stated that she did not wish to retract. In her case, the certificate cannot be made, as in others, upon proof of subscribing, or other witnesses. The acknowledgment in person before the proper officer, and his certificate in the form prescribed by law is the only evidence admissible that she ever executed the instrument. All other proof in Court or out is incompetent. For these reasons the cases cited by appellants’ counsel relating to conveyances by married women are inapplicable.”

Landers v. Bolton, *supra*.

In the case of *Roper v. McFadden*, 48 Cal. 346 (decided in 1874) the court held: “The fact that a power of attorney is not acknowledged or recorded, does not affect its validity.”

In that case no statute is cited, the court simply announces the above as law.

“Notice in fact of a deed may operate availably in

equity though the power of attorney under which the deed was made was not deposited with the deed for registration.”

Stewart v. Hall, 42 Ky. (3 B. Mon.) 218, 20 Dec.

Dig. Vendor and P., Sec. 228, i.

The law on this subject is thus set forth in Corpus Juris, Vol. 1, 750:

“In the absence of any statutory provision making the acknowledgment an essential part of the instrument, as between the parties it becomes effective, as a transfer of title or otherwise according to its purport, immediately upon its execution and delivery notwithstanding the lack of an acknowledgment, and it binds not only the parties but also their heirs and personal representatives, or, as has been said, the parties and their privies. So a grantor will not be heard to question the validity of the conveyance on the ground that it was not acknowledged by him or proved at the time of its delivery; and the contract may be enforced against him, or on his death, against his administrator in preference to the claims of his general creditors.”

Vol. I, Corpus Juris, Sec. 7, p. 750.

The following cases are cited, as applied to powers of attorney:

Williams v. Conger, 125 U. S. 397, 31 L. ed. 778.

Delano v. Jacoby, 96 Cal. 275, 31 Pac. 292.

Springer v. Orr, 82 Ill. 558.

Morris v. Linton, 61 Nebr. 527, 85 N. W. 565.

Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 At. 674.

“In the absence of any statute to the contrary, an unacknowledged conveyance is good as against all persons having actual notice of its existence, and in some cases statutes declaring unacknowledged conveyances void as against everybody but the grantor and his heirs have been construed as if containing a provision making such instruments valid as against persons with actual notice.”

1 Corpus Juris, p. 752, Sec. 8.

Power of attorney. Sufficiency of parol proof of contents of lost instrument.

“It is not necessary, in order to admit evidence of a lost instrument, that the witnesses should be able to testify with verbal accuracy to its contents. It is sufficient if they are able to state its substance.”

Kenniff v. Caulfield, 73 Pac. 803, 140 Cal. 44.

Collier v. Corbett, 15 Cal. 183.

“The destruction of a power of attorney does not destroy the power. Upon the loss of the paper, there is no reason why its existence should not be shown and the power continued, so as to carry out the object of both the principal and agent.

“In case of a lost instrument where no copy has been preserved, it is not to be expected that witnesses can recite its contents word for word. It is

sufficient if intelligent witnesses who have read the paper, understood its object, and can state it with precision.”

Postern v. Rasette & Co., 5 Cal. 467.

In that case the court said:

“The proof was sufficient to establish the existence, loss and contents of the power of attorney, **prima facie**. In the case of a lost instrument, where no copy has been preserved, it is not to be expected that witnesses can recite its contents, word for word; it is sufficient if intelligent witnesses who had read the paper, understood its object, and can state it with precision. Here, two witnesses, both of whom had been accustomed to draw papers of the like kind, and one of whom was a Notary Public, testify to the contents of the power of attorney, by stating clearly and precisely its object. I have no doubt of the competency of this evidence, and there was no error in admitting it.”

Postern v. Rasette & Crozier, 5 Cal. 470.

In the case of U. S. v. Britton, 2 Mason, 464 Fed. Cas. No. 14, 650, Mr. Justice Story said:

“If no such copy exists, the contents may be proved by parol evidence by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.”

Therefore, we submit, that in no event was the validity of the powers of attorney which John Watts had, dependent upon the same being either acknowledged or

recorded and as James W. Vroom, both individually and as President of defendant Santa Cruz Development Company, had notice of these written powers of attorney, both actual notice from John Watts, and constructive notice because the deed was recorded, prior to the execution of any deed to Vroom, or of any deed by him to said Company, the deed from Watts' heirs to Bouldin is good and effective, both as against Vroom and against the said defendant corporation.

Fourth point raised by Santa Cruz Development Company, to-wit: that the deed was not properly acknowledged or proved.

The deed was not acknowledged at the time of its execution, to-wit, September, 1884, but it was signed, sealed and delivered in the presence of two witnesses, to-wit: B. H. Davis, and David K. Osborne, as shown by the deed itself, Tr. p. 279.

Thereafter, and on the 4th day of April, 1888, one of the subscribing witnesses, to-wit: R. H. Davis, acknowledged or proved the instrument before the clerk of the court of El Paso County, State of Texas, in accordance with the laws of Arizona then in force; and having been so proved it was again recorded on the 14th day of April, 1888. Tr. p. 280.

The law in force in Arizona at that date is found in Rev. Stats. of Ariz. 1887, Sec. 2584, p. 445, which is as follows:

“The proof of any instrument of writing for the

purpose of being recorded shall be by one or more of the subscribing witnesses, personally appearing before some officer authorized to take such proof and stating on oath that he or they saw the grantor or person who executed such instrument subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence, that he had executed the same for the purpose and considerations therein stated, and that he or they had signed the same as witnesses, at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, and sign and seal the same with his official seal.”

Rev. Stats. of Ariz. 1887, p. 455.

The foregoing statute is taken from Texas. *Dorn v. Best*, 15 Tex. p. 62-67, decided in 1855, sets forth the Texas statute, which is word for word the same as the Arizona Statute of 1887. In construing that statute the Texas court, in *Dorn v. Best* says:

“The manner in which proof shall be made, of any instrument of writing, to admit it to record, is found in article 2791, Hartley’s Digest, l. e.: ‘That the proof of any instrument of writing, for the purpose of being recorded, shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath, that he or they saw the grantor, or person who executed the instrument, subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence, that he had subscribed and

executed the same for the purposes and consideration therein stated, and that he or they had signed the same as witnesses, at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, sign and seal the same with his official seal.' ”

“It seems to us obvious that the law just cited makes a distinction in the proof, when the subscribing witness is present and sees the instrument signed, subscribed or executed, and when he was not present at the time, and was subsequently called upon to witness the acknowledgment of the party who executed the instrument. In the first, the direction of the character of the proof is made complete with the words ‘subscribe the same.’ In the sixth line, before the introduction of the disjunction, or, which introduces the latter or alternative mode of proof; and in this last, the witness to the acknowledgment must be requested to subscribe his name as a witness, by the party acknowledging the same. If this be the true construction of the act on the subject, as the witness was present at the execution of the instrument and subscribed his name as a witness, it is not necessary that he should have sworn that he had been requested by the party executing the same, to subscribe his name as a witness; because the law does not require it unless there be a substantial distinction between the words subscribe and execute the same, which we cannot regard as anything more than verbal criticism. We believe the authentication of the bond in question was substantially in compliance of the requisition of the first class of proof

called for by the law, and that it ought to have been received by the court below.”

15 Tex. p. 65.

The above case is cited with approval and followed in *Downs v. Porter*, 54 Tex. 59-64, decided in 1880; and in *Jones v. Robbins*, 74 Tex. 615; 12 S. W. 824.

In the case of *Jones v. Robbins*, the court said:

“The statute (article 4314) regulating the mode of proof by a witness makes a distinction in those cases where the witness is present, and sees the instrument signed, subscribed, or executed, and those when he was not present at the time, and was subsequently requested to witness the acknowledgment of the party who executed the instrument. In the former, where the witness is present at the execution, and signed as a witness, it is not necessary that he should swear he signed at the request of the grantor. *Dorn v. Best*, 15 Tex. 65. In the case cited a certificate was objected to upon the ground above stated, and it was similar to the one under consideration, in so far as the proof is made by the witness of the execution of the power of attorney by appellant, W. S. Jones, and it was held to be a valid certificate. See also, *Downs v. Porter*, 54 Tex. 59; *Sowers v. Peterson*, 59 Tex. 216. We think the authentication of the power of attorney as to the husband, W. S. Jones, was sufficient. It was not necessary that the witness should have sworn that ‘she signed at the request of the grantor,’ when she stated that he ‘signed and acknowledged the said power of attorney in her presence.’ The latter phrase we also believe to be

equivalent to the declaration that she saw the party sign it.”

We therefore submit, that this deed from Watts' heirs to Bouldin was duly proved so as to entitle it to be recorded on April 14, 1888, and there is merit in this objection.

Fifth point raised by Santa Cruz Development Company, to-wit: that there was no consideration for the deed, and therefore it was void.

Counsel for Santa Cruz Development Company urged this point in the court below, and assigns as error, being its 10th assignment of error, the ruling of the lower court in sustaining objection of defendants Wise and defendants Bouldin to that part of the evidence of John Watts which is to the effect that neither he, Watts, nor any of the other heirs received any money or other consideration for the execution of said deed.

The deed itself recites, that the grantors, parties of the first part, “for and in consideration of the sum of One Dollar to each and every one of them in hand paid by the party of the second part, receipt whereof is hereby by each and every one of them respectively acknowledged, and for the further consideration, covenants and agreements to be performed by the party of the second part (Bouldin), hereinafter mentioned, and for the purpose of compromising and settling the claims of title between the parties of the first and second parts, and of perfecting and quieting the title to the lands herein described, have granted, bargained,” etc.

Three different considerations are recited: (1) The sum of One Dollar to each of the parties of the first part; (2) the covenants and agreements to be performed by the party of the second part, as thereafter mentioned, and (3) for the purposes of compromising and settling claims of title of the respective parties:

A deed without consideration is good as between the grantor, his heirs, and all other persons, except creditors.

“As between the parties and those claiming under them, a deed cannot be impeached on the sole ground of want of consideration.”

13 Cyc. 54.

“A deed is good as between the parties even without consideration.”

13 Cyc. 532.

That a consideration is not necessary to the validity of a deed conveying land has been held in the courts of many states.

Baker v. Wescott, 73 Tex. 129; 11 S. W. 157.

Robertson v. Hefley, 55 Tex. app. 368; 118 S. W. 1159.

A conveyance completely executed will be upheld as against the grantor or his heirs, though not supported by a valuable consideration.

Nicholas v. Shiplett, 43 S. W. 248; 19 Ky. Law. Rep. 1295.

Neither a grantor nor his heirs can impeach a conveyance as voluntary, unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.

Carnegie v. Diven, 46 P. 891; 31 Or. 366.

“A voluntary conveyance of land, not affecting creditors, made in good faith, and duly recorded, is good against a subsequent purchaser for valuable consideration.”

Beal v. Warren, 68 Mass. 447.

Therefore, even if the recital of the consideration of One Dollar, is deemed merely a **pro forma** recital, even so, the deed is good.

One of the actual considerations expressed in the deed, are certain agreements and covenants made therein by Bouldin, wherein he agrees to render services in the way of perfecting the titles, conducting litigation, advancing expenses, etc.

Such an agreement is held to be a valuable consideration, even if the party fails to perform the agreement.

“An agreement to do a thing is a sufficient consideration to support a deed, even though, as a matter of fact, the agreement is never performed.”

Gray v. Lake, 48 Iowa, 505.

2 Devlin on Deeds, 2nd ed. Sec. 809.

13 Cyc. p. 531.

In *Hartman v. Reed*, 50 Cal. 485, the court held:

“If one conveys to another a tract of land, part of a Mexican grant, in consideration of an agreement by the other to prosecute the claim before the courts for final confirmation, and the grantee fails to fulfill his agreement, the title vests absolutely, and the remedy of the grantor of the breach of the agreement is an action for damages.”

In its decision in that case, the court said:

“It is satisfactorily shown that, in the year 1854, Olvera, by deed of bargain and sale, conveyed to E. O. Crosby the undivided third of the Rancho Cuyamaca; that the only consideration therefor was the agreement of Crosby to prosecute to a final determination before the Board of Land Commissioners and the courts of the United States, the claim of Olvera to the said rancho, and that Crosby failed to perform his agreement. The title to the undivided third of the rancho vested absolutely in Crosby, and his agreement did not constitute a condition, upon a breach of which the title would revert in Olvera; but a breach of the agreement only gave Olvera a cause of action for damages.”

In the case of *Lawrence v. Gayetty*, 78 Cal. 126, the court held:

“Where a deed conveying an undivided interest in land is executed in consideration of the grantee’s oral promise to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantee does not constitute a failure of consideration so as to entitle the grantor to rescind.”

Therefore, the agreement of Bouldin to render services, advance money, etc., was a good and sufficient consideration for the deed.

The third consideration mentioned in the deed is, “for the purpose of compromising and settling the claims of title between the parties of the first and second part,” etc.

It appears from the evidence in this case, that prior to the execution of this deed, David W. Bouldin had obtained two deeds from certain persons who purported to be heirs of Luis Maria Baca, conveying to him an undivided 2-3 interest in the tract described in the 1863 location; one dated January 14, 1875, Defendant’s Wise Exhibit 15, Tr. p. 267, and the other dated January 14, 1878, Defendant’s Wise Exhibit 14, Tr. p. 261; so that Bouldin, under these deeds, was making a rival claim as owner to an interest in Baca Location No. 3, adversely to the heirs of Watts. This adverse claim and asserted right was compromised, by the execution by the heirs of Watts to Bouldin of the deed of 1884, in which Watts heirs conveyed to Bouldin, an undivided two-thirds of all

their right, title and interest, not only in Location No. 3, but also in other tracts of land inherited by them from their father, and in the deed Bouldin, on his part, agreed that their heirs should be the owners of an undivided 1-3 interest therein.

In the case of *St. Louis v. U. S.* the Supreme Court of the United States specifically upheld the validity of a deed, on the very ground that the consideration therefor was the compromise of a question of title. After reviewing all the facts the court said:

“In short, we are of opinion that the deed of Carondelet is valid, as based upon an equitable compromise of a long pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief.”

St. Louis v. U. S. 92 U. S., 462-467, 23 L. ed. 731.

“A deed of land, given in settlement of a claim of title to a greater tract, has a sufficient consideration, though the claim prove not as good as supposed.”

Jones v. Gottleff, 113 S. W. 436.

In the case of *Bartlett v. Smith*, 17 Fed. 668, the court held that the settlement or compromise of a litigated question is a valid consideration for a conveyance of land.

“A compromise of a doubtful right is a sufficient consideration for a deed.”

Rice v. Baxter, 1 Watts & S. (Pa.) 445.

We submit there is no merit in the point raised by Santa Cruz Development Company that the deed from the Watts heirs to Bouldin was void for want of consideration.

Sixth point raised by Santa Cruz Development Company, to-wit:

That the instrument is not a deed, but an executory contract to convey. This point requires a consideration of the deed itself.

The words of grant contained in the deed are as follows: "have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the party of the second part, and to his heirs and assigns forever," etc. Tr. p. 273.

Then follows the description of the lands, in which Location No. 3 is specifically described, in accordance with the description in the 1863 location, and other property.

Then comes the habendum clause, as follows: "To have and to hold, all and singular and undivided two-thirds of the above described land * * * or in any wise pertaining * * * to the undivided two thirds part thereof." Tr. p. 276.

Then comes the following, which is most important as showing how the parties interpreted the instrument themselves, to-wit: "it being understood and agreed that this is a quitclaim title and that the parties of the first

part are not to be responsible to the party of the second part for the failure of title, or any part thereof." Tr. p. 276.

Then follows a provision: "That if, in the event of the settlement of the title to the above described premises, with other claimants of said lands, the parties of the first part should become entitled to moneys or other property in lieu of said lands, or any part thereof, by reason of any sale or other transaction made by their ancestor John S. Watts, deceased, then and in that event the two thirds part of said money or other property **is hereby conveyed and assigned to the party of the second part.**" Tr. p. 276-277.

The deed is not only a present grant of an undivided two-thirds interest in the lands described therein; but it is also a present conveyance and assignment of two thirds of any moneys or other properties to which the parties of the first part should become entitled by reason of any sale or other transaction of their ancestor.

Bouldin, on his part, therein agrees to perform certain services; then follows a provision to the effect that upon a final and complete settlement of the titles to said lands, the parties of the first part are to have, own and possess in fee an undivided 1-3 of the net lands recovered and 1-3 of the moneys. Tr. p. 277-278.

This is a very important provision in contruing the deed, for it makes manifest that the grantors considered that they had, by most positive language, granted

and conveyed two thirds of the lands therein described, as well as two thirds of all money or other property that might be realized in the settlement of various claims; and therefor, they only provided that upon the final and complete settlement of all matters, **they, the heirs, should receive 1-3 thereof.**

There is no provision that upon such a settlement Bouldin should receive two thirds of such moneys or other property. The reason there is no such provision is clear, namely, because the heirs had, by positive words of grant and conveyance, as theretofore set forth in the deed, absolutely granted, assigned and conveyed to Bouldin an undivided 2-3 interest, and there was nothing left for them to convey to him, as to that undivided 2-3 interest.

At the end of the instrument follows, as an independent transaction, the execution of a power of attorney to Bouldin, **to take possession of the whole of the above described lands,** and to receive the rents, and so forth. Tr. p. 278.

As the heirs of Watts retained an undivided 1-3 interest in the lands conveyed by them to Bouldin, it was necessary that they empower him, as their attorney in fact, to have full control of their undivided 1-3 interest; and for this manifest purpose the power of attorney was executed. The mere execution of this power of attorney in no way conflicts with the prior absolute grant to Bouldin of the undivided two thirds interest in the lands therein described.

If there were any doubt as to whether the instrument is a present grant, or an executory contract hereafter to convey, that doubt would be dispelled by the construction of the intent, which the parties themselves make in the instrument. In the deed itself the parties say, as heretofore quoted: "it being understood and agreed that this is a quitclaim title, and that the parties of the first part are not to be responsible to the party of the second part for the failure of title, or any part thereof."

In the case of *Morrison v. Wilson*, 30 Cal. 344-348, supra, the question presented was whether or not a deed containing as words of conveyance "has granted, bargained, sold and hereby conveys," in which at the end of the deed was the following sentence, "it is fully understood that as to title this is only a quitclaim deed," the court held:

"Contracting parties have the power to define the words which they use in the contract, and if the agreed definitions are free from ambiguity the contract will be enforced according to the definition thus assigned."

And the court held that the language in the deed made it a quitclaim deed, by virtue of the provisions of the parties therein to that effect.

And so, if there were any question as to what the parties meant, or intended, in the deed from Watts' heirs to Bouldin, on September 30, 1884, the provision therein, that what was conveyed was a quitclaim title, would

conclusively show that the deed was an absolute conveyance; and was neither an executory contract, thereafter to be performed, or anything else than a deed conveying a present interest.

We therefore submit as to this point, that a mere reading of the deed, from the Watts heirs to Bouldin, shows that it was a deed of present grant, bargain and sale, limited by agreement of the parties, as conveying only a quitclaim title; that this deed did convey or quitclaim a present two thirds of all the interest of the heirs of Watts to Bouldin, and was no executory contract.

And, as to each and all of the objections made to this deed, by defendant Santa Cruz Development Company, and no other party to this action raised the specific objections raised by said Company, we submit, that these objections are without merit; and that the instrument is a valid deed, conveying to David W. Bouldin an undivided 2-3 interest of whatever interest the grantors therein, heirs of John S. Watts, had, on September 30, 1884, the day the deed was executed.

And we further submit, that said deed was properly received in evidence by the court; or, should this court hold that the transcript of the record in this case discloses that any objection to it was sustained, that the sustaining of any such objection was error, and that the deed should have been received in evidence.

ASSIGNMENT OF ERROR VIII.

The court erred, after admitting in evidence an exemplified copy of the judgment and proceedings in a certain case, entitled in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, John Ireland and Wilbur H. King, plaintiffs, vs. David W. Boulton, defendant, and later Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, defendant, etc., being Defendants Wise Exhibit 19, Tr. p. 456-498, subject to the objections of defendants Bouldin and plaintiffs, in thereafter, and after Defendant Wise had rested his case, sustaining said objections.

Upon the trial of the case, appellant Joseph E. Wise offered in evidence a duly exemplified copy of the judgment and all proceedings, in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, in which case a judgment was rendered foreclosing an attachment lien upon all the interest of David W. Bouldin, in Baca Location No. 3, according to the 1863 description, and ordering the same to be sold; the sale thereof by the sheriff; the confirmation of sale, etc., being "Defendants Wise Exhibit 19." Tr. pp. 456-498.

This judgment and proceedings was material evidence to show that the interest which David W. Bouldin had acquired from the heirs of Watts had been sold under a judgment and order of the court, by the sheriff, to Wilbur H. King, and had vested title in him as purchaser at the sale, no redemption having been made; also to prove

the authority of the sheriff to execute the deed to King, which thereafter he did execute; also to show the subsequent confirmation of sale, etc. The record and proceedings are all in one document, being collectively Defendants Wise Exhibit 19, Tr. p. 456-498.

To the introduction in evidence thereof defendants Bouldin objected on the following grounds:

1. That the court had no jurisdiction to enter that particular judgment, insofar as the judgment undertakes to foreclose the attachment lien and order a sale of the property by the sheriff.
2. That the judgment is void because there was not in the complaint, or any amendment thereof, a waiver of recourse against other property of the decedent, Bouldin.
3. That there are minor errors of description of the property in the judgment.
4. That the notice of sale given by the sheriff does not state he will sell the attached interest, but gives notice that he will sell the interest of defendant Goldschmidt, administrator, and such interest as Bouldin had at the time of his death.
5. That the return of sale shows that no valid levy was made under the execution and judgment.
6. That the return of the sheriff also shows that he sold the interest of Leo Goldschmidt, administrator.
7. That the return shows two courses east in the description of the property, which is attempted to be ac-

cording to the 1863 location, and does not tie to any place.

8. They further objected to that part of the proceedings as proceedings of the Superior Court of Pima County, in that they are entitled in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, and Goldschmidt was the defendant in the action; that the papers are entitled as the case was when it was first filed in the District Court.

9. That the said order made by the Superior Court of Pima County, directing John Nelson, Sheriff, to execute a deed, was without jurisdiction; that it was an **ex parte** proceeding in which service was made upon no one; and upon the further ground that the court had no power or authority to direct the sheriff of Pima County, to convey land in Santa Cruz County, if it otherwise had power in the premises.

Upon these objections the court ruled at the time as follows:

THE COURT: "It may be received subject to the defendants' objection."

MR. NOBLE: "If the court please, may it be understood that we make the same objections without restating them?"

THE COURT: "Yes, and the same ruling." Tr. p. 317.

Thereafter, and after the court had ruled that the deed from John S. Watts to Hawley conveyed all the interest

which John S. Watts had acquired under the deeds from the Baca heirs of 1864 and 1871, it sustained these objections. Tr. 438-439, to which ruling defendants' Wise excepted.

The objections made by defendants Bouldin and plaintiffs can be grouped under three heads:

1. The jurisdiction of the court to render the judgment.
2. The validity of the sale made by the sheriff, as shown by the sheriff's return thereof, and
3. The jurisdiction of the court to confirm the sale and direct execution of curative deed by the sheriff.

We will first briefly state the material part of the judgment and proceedings as disclosed by the record in that case, and then consider the objections made by defendants Bouldin and sustained by the court.

Defendants Wise Exhibit 19, the judgment and proceedings aforesaid, contains the following instruments and records:

1. March 13, 1893: Complaint filed by John Ireland and Wilbur H. King against David W. Bouldin before the District Court of the First District of the Territory of Arizona, for Pima County, to recover \$5,000, attorneys' fees and interest; summons and writ of attachment issued. Tr. pp. 456-458.

2. March 14, 1893, Sheriff's levy of writ of attachment on Location No. 3, selected under Act of Congress of June 12, 1860, and referring to records in office of

County Recorder for further and better description. Tr. p. 464.

3. May 10, 1893. Answer of Bouldin filed. Tr. p. 466.

4. April 20, 1895, Appointment of Leo Goldschmidt as Administrator of the estate of David W. Bouldin, deceased, by Probate Court of Pima County, Arizona, and issuance of Letters of Administration to him. Defendant Wise Exhibit 21, Tr. p. 318, also p. 506.

5. April 20, 1895. Minute entry of said District Court substituting Leo Goldschmidt, Administrator of the Estate of David W. Bouldin, deceased, as defendant in before mentioned suit. Defendants Wise Exhibit 20, Tr. p. 498.

6. May 2, 1895. Judgment of said District Court as follows:

“This cause came on regularly for trial on the 2nd day of May, 1895, Francis J. Heney appearing as counsel for plaintiffs and Leo Goldschmidt administrator of the estate of David W. Bouldin, deceased, appearing in his own proper person as the defendant in said cause, by reason of the death of said David W. Bouldin, having been suggested to the court and said Leo Goldschmidt as such administrator having been substituted as defendant in said cause by order of the above entitled court. A trial by a jury having been expressly waived by the respective parties, the cause was tried before the court sit-
tin without a jury, and witnesses were duly sworn and examined and evidence was introduced, and it having

been clearly proved that the claim sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, after he had duly qualified as such administrator and during the pendency of this action, and it further appearing that he had rejected the same, the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court finds all the issues for the plaintiffs.

Wherefore it is ordered, decreed and adjudged that John Ireland and Wilbur King, the plaintiffs, do have and recover from Leo Goldschmidt, as administrator of David W. Bouldin, deceased, the sum of eight thousand five hundred and fifty dollars, with interest thereon at the rate of ten per cent per annum, from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of \$34.45, and that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased.

And it further appearing to the court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied upon all of the right, title and interest of David W. Bouldin in and to the following described real estate, lying, being and situated in the County of Pima, Territory of Arizona, to-wit, Location No. three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21, 1860, entitled "An act to confirm certain private land claims in New

Mexico," and found in volume 12, page 72, of the United States Statutes at Large, said location being described as follows: situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty four links; thence north twelve miles, thirty six chains and thirty four links to the place of beginning, and containing ninety-nine thousand two hundred and nine acres, and thirty nine hundredths of an acre, more or less.

And it further appearing to the court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the Sheriff of the County of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W. Bouldin in the above described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary

to satisfy the said judgment with costs and costs of said sale. J. V. Bethune, Judge. Done in open court this 2nd day of May, 1895.” Tr. pp. 468-471.

7. August 6, 1895. Return of Sheriff, Robert N. Leatherwood, on order of sale, dated July 3, 1895, amongst other things recites:

“And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale, by posting notices of said sale in three public places, one of which was at the court house door and also by advertising in the “Citizen,” a daily newspaper of general circulation published in the City of Tucson, Pima County, Arizona Territory, a copy of which is hereto attached, from the 8th day of July, 1895, until the 31st day of July, 1895, daily and successively. And I further certify that I did attend at the hour, time and place advertised for sale and offered for sale a part of said property for sale and received no bid. I then offered two parts of sale property for sale and received no bid. I then offered three parts of said property for sale and received no bid, then I offered the whole of said property for sale, and received a bid of Two Thousand Dollars (\$2000.); that being the highest and best bid offered in lawful money of the United States, the said property was sold to Wilbur H. King.” Tr. pp. 472-474.

The notice of sale, referred to and annexed to the sheriff's return, recites, among other things:

“Notice of Sheriff's Sale. John Ireland and Wilbur H. King vs. Leo Goldschmidt, Administrator of the Estate

of David W. Bouldin, deceased. Under and by virtue of an execution and order of sale issued out of the District Court of on the 3rd day of July, 1895, and to me as sheriff duly directed and delivered, on a judgment rendered in said Court in the above entitled action, on the 2nd day of May, 1895, for the sum of \$8584.45, with interest thereon at the rate of ten per cent per annum, until paid, together with the foreclosure of plaintiffs' attachment lien upon the property in Pima County, Territory of Arizona, upon which I have duly seized and levied and in said order of sale described as" (here follows same description as in the judgment) **"as said attachment lien existed on the 14th day of March, A. D. 1893."**

Public notice is hereby given that I will at on the 3st day of July, 1895, sell at public auction . . . all the right, title and interest, both legal and equitable of the above named defendant, in and to the above described property, and all the right, title and interest said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property, or so much thereof as may be necessary to satisfy said judgment and costs of suit and all accruing costs. Dated July 8, 1905, R. N. Leatherwood, Sheriff." Tr. p. 474-476.

Note: David W. Bouldin died December, 1893. Tr. p. 148.

8. September 30, 1914. Joseph E. Wise, assignee and grantee of Wilbur H. King, purchaser at the sale, filed a verified petition in said case, in the Superior Court of Pima County, State of Arizona, the successor of the said

District Court of the Territory of Arizona, wherein, amongst other things, he recites all of the foregoing proceedings, the sale and assignment to him by Wilbur H. King, of all the interest acquired by King at said Sheriff's sale; that the deed executed thereunder by Wakefield, Sheriff, aforesaid, by inadvertence or mistake only purported to convey the right, title and interest which Leo Goldschmidt, Administrator of the estate of David W. Bouldin, deceased, had at the date of said sale, and did not recite that the same conveyed the interest of said Bouldin, which had been attached and foreclosed under said judgment; that there were other mistakes and discrepancies in said deed, and that it was necessary a new deed be executed by the Sheriff of Pima County. Wherefor, he prayed that John Nelson, the then sheriff of Pima County, be authorized and directed to execute to him, as grantee of King, a proper deed, and for such other and further orders as may be meet in the premises. Tr. p. 480-487.

9. September 30, 1914. Upon this date, the said Superior Court of Pima County, in said case aforesaid, upon the petition of Joseph E. Wise aforesaid, made and entered an order reciting, among other things:

“Upon the reading and filing of the petition of Joseph E. Wise herein, and an inspection of the records of this court in the above entitled case, and it appearing to the court from the said record that,” (here follows full findings of the bringing of the suit, levy of attachment, appearance of Bouldin, the substitution of his administra-

tor, the judgment, order of sale, return of sheriff, sale mistakes of the sheriff's deed, etc.) "and it further appearing that said Joseph E. Wise, as the grantee and successor in interest of said Wilbur H. King, the purchaser at said sale, is entitled to have executed to him by the Sheriff of Pima County, as successor of the sheriff of Pima County, Territory of Arizona, who made said sale, a deed which properly conveys to him, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property, so foreclosed by the said judgment and decree of this court, and so sold by the said sheriff at the said sale aforesaid, and so purchased by said Wilbur H. King."

"Now, therefore," and here follows the order of the court authorizing the then sheriff of Pima County, John Nelson, to execute, acknowledge, and deliver to said Wise, his deed as such sheriff, conveying to Wise, all of the right, title and interest in and to the property so sold at the sheriff's sale, aforesaid, etc. Tr. p. 489-496.

The first objection of defendants Bouldin is, that the court had no jurisdiction to enter that particular judgment, insofar as the judgment undertakes to foreclose the attachment lien and to order a sale of the property by the sheriff.

The record shows that Bouldin in his lifetime appeared and filed an answer in the action. This gave the court jurisdiction over him. After his death his administrator was substituted as defendant. The judgment recites that this administrator appeared in his own proper

person at the trial, and expressly waived a trial by jury, etc. So the court had jurisdiction over him.

The real property of Bouldin having been levied on during his lifetime, the court also had jurisdiction over the property itself. The court having jurisdiction over the parties and the subject matter, its judgment is not subject to collateral attack.

“Where a court has jurisdiction of the parties and the subject matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by the parties or their privies in any collateral action or proceeding whatever.”

Black on Judgments, Vol. 1, Sec. 245.

McGoon v. Scales, 9 Wall. 23-32; 9 L. ed. 545.

“Where a court has jurisdiction of the parties and the subject matter, its judgment, although irregular in form or erroneous or mistaken in law, is conclusive as long as it remains unreversed and in

force, and cannot be impeached collaterally.”

23 Cyc. 1090;

Cooper v. Reynold's Lessee, 10 Wall. 308;

Voorhees v. Jackson, 10 Pet. 449;

Mansen v. Duncanson, 166 U. S. 533; 41 L. ed. 1105.

The point urged by defendants Bouldin is, that the death of David W. Bouldin dissolved the attachment levied in the suit, and the court had no power to decree a foreclosure of the attachment lien, and order the property sold.

This objection does not go to the jurisdiction of the court. It questions, not the power of the court to render the judgment; but the correctness of the judgment it did render. Such a question cannot be raised on collateral attack.

There is no merit in the objection for another reason, namely, that in Arizona death does not dissolve an attachment lien.

The attachment statute in force in Arizona in 1893, and ever since, provides that the levy of an attachment creates a lien on the real estate levied on; and that if the plaintiff recover in his suit **the court shall direct the sale of the real estate levied upon to satisfy the judgment.** The statute is as follows:

67 “The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on.

68. “Should the plaintiff recover in the suit, the court shall direct the proceeds of the personal property sold, to be applied to the satisfaction of the judgment, and the sale of the personal property re-

maining in the hands of the officer and of the real estate levied on to satisfy the judgment.”

Rev. Stats. of Ariz. 1887, par. 67 and 68.

The statute of Arizona authorizing the substitution of the administrator for Bouldin, upon his death, is as follows:

“An action shall not abate by the death or other disability of the party, or by the transfer of any interest therein, **if the cause of action survive or continue.** In case of the death or disability of a party the court on motion, may allow the action to be continued by or against his representative or successor in interest.”

Rev. Stats. Ariz. 1887, Sec. 725.

The foregoing statutes are taken from Texas. In a Texas case, decided in 1893, where the Texas statute is set forth and fully considered, the court held:

“An attachment does not abate, nor is its lien lost, by defendant’s death, after the levy of the writ, and before rendition of judgment.”

Rodgers v. Burbridge, 24 S. W. 300, 302.

The Supreme Court of Arizona has likewise held that death of the defendant does not dissolve an attachment lien; and such is the settled law in this state.

Watman v. Pecka, 8 Ariz. 8-15; 68 Pac. 534.

In that case the court said:

“The appeal in this case raises but one question: Does the death of a defendant after suit brought, and after the levy of an attachment has been consummated upon his property, **ipso facto** dissolve the lien of such attachment? * * *

An examination of the Probate Act has satisfied us that the power to foreclose an attachment lien remains in the district court, notwithstanding the death of the defendant, and that there is no real difficulty in reconciling the provisions of the Probate Act with this view.”

Watman v. Pecka, 8 Ariz. 8-15; 68 Pac. 534.

In this decision the Arizona court disapproves the case of Myers v. Mott, 29 Cal. 359, which holds, (perhaps under a different attachment statute) a contrary view.

And such is the law generally.

“Although there are decision to the contrary in some jurisdictions, the weight of authority is to the effect that an attachment is not dissolved by the death of either plaintiff or defendant unless a statute expressly so declares.”

1 Corpus Juris, par. 403, p. 208.

Therefore, if the question presented were one of jurisdiction, which it is not, even then, under the established law in Arizona, the death of Bouldin did not dissolve the attachment and the court had jurisdiction to enter its judgment foreclosing the same and ordering the attached property sold to pay the debt found due.

Therefore, upon the trial of the case now on appeal, the lower court erred in sustaining this objection of defendants Bouldin to the introduction in evidence of the judgment and record, under which the interest of David W. Bouldin in the property was sold; for it was competent and material evidence to prove the power and authority under which the sheriff subsequently sold the property to King and executed a sheriff's deed therefor.

The second objection raised by the Bouldin heirs is, that the judgment is void because there was not, in the complaint, or any amendment thereof, a waiver of recourse against other property of the deceased Bouldin.

This manifestly is a question which goes to the sufficiency of the complaint, and could only be raised by demurrer. It in no way affects the jurisdiction of the court.

But if it did, then we call attention to the recital in the judgment, wherein the court finds that the claim sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, during the pendency of this action, and that he had rejected the same. Tr. p. 468.

The statute specifically gives the right to sue the administrator when a claim is rejected by him; and this right is based upon the rejection of the claim, and not upon any waiver of recourse against other property of the deceased estate. There is no merit in this objection.

The third objection raised by defendants Bouldin is,

that there are minor errors of description of the property in the judgment.

Such an objection merits no consideration; and if it did, we would simply state that the errors referred to are trivial; and taken altogether, the description of the tract of land in the judgment, is a correct and specific description of the tract described in the 1863 location.

The fourth, fifth, sixth and seventh objections made by defendants Bouldin are to the return of the sheriff, and to the notice of sale. All of these objections relate to the return of the sheriff and will be considered together.

The return of the sheriff does show that an order of sale was made, under the judgment of the court, directing him to sell the property foreclosed; that the sheriff gave notice of the time and place of sale as required by law; that at that time and place he offered for sale, at public auction, the property in the notice and judgment described; that the notice of sale specifically states that the judgment was for "the foreclosure of plaintiff's attachment lien on the following described property. . . . as said attachment lien existed on the 4th day of March, A. D. 1893;" that he sold said property at said sale to Wilbur H. King, the highest and best bidder therefor; and that the property was sold to Wilbur H. King. Tr. p. 472.

The objections raised to this return of the sheriff do seem too trivial to require consideration; but they were made; they were sustained by the lower court, when it sustained the objections made; and we are compelled briefly to refer to them.

The objection that the notice of sale stated that the sheriff would sell, not the interest Bouldin had on March 14, 1893, when the attachment was levied, but the right, title and interest which Bouldin had at the time of his death, in no way affects the validity of the sale. It might involve the question as to what interest **was** sold; the interest that Bouldin had in March, 1893, or the interest he had at the time of his death; but that is all.

David W. Bouldin died December, 1893, eight months after the levy of the attachment. His heirs could only inherit the title he had at the time of his death. If that interest was sold by the sheriff, it is immaterial to them whether or not that sale also conveyed the interest Bouldin had at the time of the attachment, which was eight months before his death. They are not interested in that question; for in no event could they inherit any greater interest than David W. Bouldin had at the time of his death.

The next objection is that the return of sale shows no valid levy under the execution and judgment. The levy was made by a levy of the writ of attachment. The property was in the custody of the court by virtue thereof at the time of the judgment, and the lien being foreclosed and the property ordered sold no further levy was necessary. The levy was made under the writ of attachment, not under the order of sale.

The attachment statute of Arizona, heretofore quoted, specifically provides that the court, upon foreclosing an attachment lien shall order the real estate to be sold. The

sale is then made under the judgment of foreclosure.

As was said by the court in the case of Holter Hardware Co. v. Ontario Mining Co., 24 Mont. 184; 61 Pac. 3:

“An attachment having been levied within the life of the writ, a lien is created which may be enforced by execution sale, without further levy * * * When property has been attached under a writ of attachment, there is no occasion for levying thereon a writ of execution. The lien acquired by the attachment is sufficient.”

The next objection is that the return shows that the sheriff levied upon the interest of Goldschmidt, administrator, and nothing else.

But, as above stated, no levy was necessary, and the mere recital of the sheriff that he levied on the interest of the administrator is mere surplusage, and in no way invalidates the sale.

In this return, the sheriff, after describing the property, certifies as follows:

“And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale by posting notices of said sale in three public places and by advertising in the ‘Citizen’ * * * a copy of which is hereto attached * * * And I further certify that I did attend at the hour, time and place advertised for said sale and offered for sale a part of said property * * * then I offered

the whole of said property for sale * * * the said property was sold to Wilbur H. King.” Tr. p. 474.

What property did the sheriff sell? Manifestly the property which he advertised for sale in the notices posted and published, a copy of which notice is attached to his return. He so stated in his return.

A copy of this notice is attached to the return. In this notice of sale the Sheriff recites that under the Order of Sale issued under the judgment of the court for \$8584.45 together with the foreclosure of plaintiff's attachment lien upon the following described property, “upon which I have duly seized and levied, and in said order of sale described as (here comes full description of the property) “as said attachment lien existed on the 14th day of March, A. D. 1893.”

“Public notice is hereby given that I will sell at all the right, title, claim and interest, both legal and equitable, of the above named defendant, of, in and to the above described property, and all the right, title and interest, both legal and equitable, which said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property. * * *” Tr. pp. 474-476.

The property he advertised for sale, manifestly from the reading of the notice itself, was all the right, title, and interest in the property therein and in the order of sale described, which David W. Bouldin had at the time of his death.

And this property, so advertised, the sheriff, in his return, certifies he sold to Wilbur H. King.

The objection of defendants Bouldin, that the sheriff only sold the interest of the administrator, is not supported by the record itself; and there is absolutely no merit in that objection.

The last objection is that in the return of the sheriff is a mistake in description in regard to one of the courses. However, as the notice of sale itself is part of the return, and this mistake does not appear in the notice, there is nothing in this objection. The description in both the return, and the notice of sale annexed thereto, contain a correct description of the property foreclosed, ordered sold and actually sold by the sheriff.

We therefore submit that there is no merit whatsoever in any of these objections to the sale so made by the sheriff, and the return of sale of the sheriff, which was part of the court proceedings which defendants Wise offered in evidence; and the court erred in sustaining any of these objections thereto.

The eighth and ninth objections of said defendants, refer to the order of the Superior Court of Pima County, made in the case, confirming the sale and directing the sheriff to execute a deed.

Upon the trial of the case defendant Wise introduced in evidence, as a separate exhibit, the sheriff's certificate of sale executed to Wilbur H. King, dated July 31, 1895,

being Defendants Wise, Exhibit 22, Tr. p. 319, also p. 513.

He also introduced in evidence, as a separate exhibit, the sheriff's deed to King, dated January 16, 1899, executed by the sheriff, no redemption from the sale having been made. Defendants Wise Exhibit 23, Tr. 319, also p. 515.

Now, by reason of certain inaccuracies and mistakes in this sheriff's deed, defendant Joseph E. Wise, as the assignee and grantee of King, thereafter, and on the 30th day of September, 1914, filed a petition in the Superior Court of Pima County, Arizona, the successor of the territorial district court, in the said case of Ireland and King vs. Bouldin, and Goldschmidt, administrator, wherein he recites the judgment, order of sale, sale, issuance of certificate of sale to King, execution of sheriff's deed to King, and deed and assignment from King to him; and also recites that the sheriff's deed was defective in that it purported only to convey the interest of Leo Goldschmidt, administrator, in the lands described therein, and not the interest which was sold at the sale, to wit: the interest of David W. Bouldin; and he prayed for an order of the court, authorizing and directing the sheriff of Pima County to execute to him a new deed to correct the defects in the old one.

No notice was given of this application; it was purely an **ex parte** matter. The Superior Court, on the same day, made an order in which it recited and found, upon inspection of its own records, that a valid sale had been

made by the sheriff to Wilbur H. King; that the deed executed was defective, and it did then order John Nelson, the then sheriff of Pima County, as successor of the sheriff who made the sale, to execute a deed to Joseph E. Wise, assignee of King, purchaser at the sale, conveying to him the property so sold, the deed from the former sheriff being defective in form.

If the court had jurisdiction to make this order, then the order is not subject to collateral attack. The order made is in the nature of an order confirming a sale; in fact it is an order directing the sheriff to execute a good deed to the purchaser at a sale made by order of court, to cure errors in the deed that was made. The only question is whether or not the court had jurisdiction to make such order, no notice having been given of the application therefor, to Leo Goldschmidt, administrator, the defendant in the action.

The question, whether or not notice of the application should be given to Goldschmidt, administrator, is not a jurisdictional question; it is purely a matter of practice which the Superior Court itself had jurisdiction to decide.

If the court had jurisdiction to render the judgment ordering the sale, and we have shown that it had; then that jurisdiction continued until its order was fully carried into effect by the execution of a proper deed to the purchaser; and the court had jurisdiction, on its own initiative, to order its officer properly to carry out and ex-

ecute its decree. Its power in that regard did not depend upon notice to the defendant.

It was not the notice to Goldschmidt, administrator, which gave the court jurisdiction to confirm the sale, or to direct the sheriff to execute a proper deed, a valid sale having been made; it was the jurisdiction which the court had theretofore acquired to render the judgment and to order the property sold, which gave it jurisdiction to carry its own judgment into effect. As the court had jurisdiction to render the judgment, it also had jurisdiction to carry that judgment into effect by ordering a proper deed to be executed by the sheriff. Any order of this nature, being within the court's jurisdiction, is not subject to collateral attack.

Goldschmidt, administrator, had no interest in the matter, for the reason that all the title of Bouldin, deceased, had been sold, and the time for redemption had expired. An application for the execution of a proper deed was not a matter of which notice to him was necessary, or a matter in which he had any right to be heard.

“However, after the execution sale, and the expiration of the redemption period, the judgment debtor has no such interest in the land as will entitle him to raise objections to the completion of the same by the execution of the deed, he then occupying the position of a mere stranger.”

17 Cyc., 1342, and authorities there cited.

This order, then, of the Superior Court, being within its jurisdiction, to carry into effect its judgment or de-

cree, is not subject to collateral attack, any more than the judgment itself.

“Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings, being **coram judice**, can be impeached collaterally only for fraud.”

McNutt v. Turner, 16 Wall., 352-366.

Voorhees v. Bank, 10 Peters, 449.

As said by this Honorable Court, in the case of National Nickel Co. v. Nevada Nickel Syndicate, 50 C. C. A., 115, 112 Fed., 44-48:

“No appeal was taken by the plaintiffs in error from the decree of foreclosure, or from the order confirming the sale. There has, therefore, been a final determination of all the issues of that case, and one of the issues so determined was the regularity of the proceedings, resulting in the sale of the property.”

The order, therefore, of the Superior Court, directing the then Sheriff of Pima County to execute a curative deed to Wise, assignee of King, is not subject to collateral attack, and there is no merit in defendants Bouldin's objection to that order of the court.

This disposes of the objections raised by defendants Bouldin to the introduction in evidence of the judgment and proceedings, Defendants Wise Exhibit 19.

We submit that there is no merit whatever in any of the objections raised by said defendants; and that the lower court erred in sustaining their said objections, as well as any objections which the plaintiffs made on the same grounds, or on the ground that the entire record was immaterial because John S. Watts in his lifetime had conveyed all of his title to Hawley.

ASSIGNMENT OF ERROR IX.

The court erred in striking out the testimony of Joseph E. Wise, in regard to his possession of a certain 160 acres, which he claimed by virtue of adverse possession only.

Joseph E. Wise testified that he had been in the peaceable, adverse possession, using and cultivating the same, of a certain 160-acre tract within the limits of Baca Float No. 3, for more than ten years prior to April, 1907, the date he obtained his deeds from Wilbur H. King and Mrs. A. M. Ireland, and that by virtue of such adverse possession he had, prior to obtaining their deeds, become the owner of the 160-acre tract, and ever since has been the owner thereof. Tr. pp. 385-392.

This testimony, on motion of the plaintiffs, was stricken from the record as being immaterial, upon the ground that the statute of limitations did not commence to run against any of the claimants of the Baca Float until the field notes and Contzen survey had been approved and filed by the Secretary of the Interior, on December 19, 1914; no segregation of the lands from the public domain being effected until the filing and approval of said survey. Tr. pp. 432-433. The court granted the motion, to which ruling Wise excepted.

The only question involved in this assignment of error is, as to when the statute of limitations commenced to run in favor of one claiming by adverse possession only; whether from December, 1914, when the official survey

and plat was approved and filed; or from April 9, 1864, when the selection of the tract was approved.

The statute of Arizona on the subject of adverse possession only, is as follows:

“Any person who has the right of action for recovery of any lands, tenements or hereditaments against another, having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.”

Rev. Stats. of Ariz. (1901), par. 2938.

Rev. Stats. of Ariz. (1913), par. 698.

“The peaceable and adverse possession contemplated in the preceding section as against the person having right of action, shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same be less than 160 acres.”

R. S. A. (1901), par. 2939.

R. S. A. (1913), par. 699.

As Wise had such adverse possession, for more than ten years prior to April, 1907, of the 160-acre tract in question, his testimony to that effect was material; provided, that the statute of limitations is held to run against the claimants of the grant when the selection was approved, in 1864. If it is held that the statute

does not run until the approval and filing of the plat, in December, 1914, then the testimony was immaterial.

In the case of *Lane v. Watts*, 234 U. S. 525, being the suit by certain grant claimants to compel the Secretary of the Interior to approve and file the Contzen plat and survey of the Baca Float, the Supreme Court said:

“We agree with the courts below that a survey was necessary to segregate the lands from the public domain. *Stoneroad v. Stoneroad*, 158 U. S., 240; 39 L. ed. 399. This was done by the Contzen survey, which we have seen was directed to be filed by the lower courts without alteration—a decision which we approve.”

The Supreme Court of the United States, in other cases, involving Congressional grants of lands to railroads, has held that until the selection and map thereof is approved by the Land Department, the land is not segregated, but is part of the public domain, and is not subject to taxation.

Wisconsin Central R. R. Co. v. Price County, 133

U. S. 496; 33 L. ed. 687.

U. S. v. Missouri K. & T. R. Co., 141 U. S. 358;
36 L. ed. 766.

Ryan v. Central Pacific R. Co., 99 U. S. 382; 25
L. ed. 305.

But the Supreme Court, in the case of *Lane v. Watts*, *supra*, further decided that the title to the lands described

in the 1863 location passed absolutely to the heirs of Baca on the approval of said location on April 9, 1864. In this point the court said:

“The crux of the case in the views of the court below, is the question whether title to the lands passed out of the United States in April, 1864.”

“Appellants contend that ‘under a proper construction of the Act of June 21, 1860, title to the “Float” cannot pass until there has been a final survey and a final determination by the proper officers that the land selected in 1863 was of the character which the statute permitted the heirs to take—a matter **sub judice** in the Department,’ except as to certain conflicting ground. The appellees insist, and the courts below, as we have seen, decided that the location of the grant, and the approval of it by the Surveyor General of New Mexico, and subsequently, in April, 1864, by Commissioner Edmunds of the Land Office, transferred the title to the heirs of Baca.”

The court, after considering the question, then said:

The title having passed by the location of the grant, and the approval of it, the title cannot be subsequently divested by the officers of the Land Department. *Ballenger v. U. S.* 216 U. S. 240; 54 L. ed. 464. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined.”

After a further consideration the court goes on to say, as heretofore quoted:

“We agree with the courts below that a survey was necessary to segregate the lands from the public domain.”

Lane v. Watts, *supra*.

If the title passed to the heirs of Baca in 1864, then they, or those claiming under them, had the right to bring a suit in ejectment against Joseph E. Wise any time after that date. They had the right of action against him when he first entered into possession of his 160 acre tract, and not having prosecuted that action for more than ten years after the right of action accrued, such action is barred under the Arizona statute, and Wise acquired a good title to the 160 acres by virtue of the Arizona statute of limitations.

If, however, the fact that no approval of the survey of Baca Float had been filed and approved, prevented the heirs of Baca, or those claiming under them, from bringing ejectment, then, of course, the Arizona statute of limitation would not run.

The Supreme Court of the United States, and the Supreme Court of Arizona, as well as other courts, have held, in regard to Mexican land grants, that while proceedings are pending before the tribunals of the United States for the confirmation of such grant, the statute does not run, and could not run, against the right of the claimant to the land in controversy; for the reason, that

the action of the Government, and the rights which perfected title insures to its possessor, cannot be impaired or defeated in any respect by the statute of limitations of the state.

Henshaw v. Bissell, 18 Wall. 255; 21 L. ed. 835.

Crittenden Cattle Co., v. Ainsa, 14 Ariz. 306; 127 Pac. 733.

Galendo v. Wittenmeyer, 49 Cal. 12.

Altschul v. ONeil, 35 Or. 202; 58 Pac. 95.

We appreciate that this is a very close question in the present case; but in view of the language of the decision in Lane v. Watts, *supra*, to the effect that absolute title vested in the heirs in 1864, we submit that these heirs, and those claiming under them, had the right to bring a suit in ejectment any time after 1864; and if they did have such right, then, as no subsequent title was obtained from the United States, the enforcement of the statute of limitations of Arizona would in no way impair the title which they had or could receive from the Government.

If this court takes this view of the law, then the lower court erred in sustaining the motion to strike out the testimony of Joseph E. Wise aforesaid.

ASSIGNMENT OF ERROR X.

The court erred in sustaining the motion of plaintiffs to strike out the testimony, and admissions as to the testimony, of defendant Lucia J. Wise, as to her title by adverse possession to a certain 40 acre tract of land.

The testimony referred to proved that Mary E. Sykes, mother of Lucia J. Wise, had been in adverse possession of a certain forty acre tract within the limits of Baca Float No. 3 continuously from the year 1900 until the date of her death, in the year 1913, that defendant Lucia J. Wise is her daughter and executor, and as such has title and possession to the same forty-acre tract.

This testimony, on motion of plaintiffs, for the reason stated in the preceding assignment, was also stricken from the record. Tr. p. 432.

As the same point is involved here as in the preceding assignment of error, we will not further discuss the same, except to say that the evidence further showed that said Mary E. Sykes had first entered the land as a homestead under the United States homestead law; also that Joseph E. Wise, in regard to his 160 acre tract, had done the same thing. However, as heretofore held by this Honorable Court, such a fact in no ways affects the question here involved.

“Certainly the general rule is well settled that adverse possession of land, though held in admitted subordination to the title of the Government, may nevertheless, be adverse to everyone else.”

ASSIGNMENT OF ERROR XI.

This assignment of error is not urged, and need not be considered.

ASSIGNMENT OF ERROR XII.

The court erred in overruling the objection of defendants Wise to the introduction in evidence by defendants Bouldin of certain deeds in the assignment of error mentioned.

Upon the trial of the case the court permitted, over the objection by defendants Wise, defendants Bouldin to introduce the following deeds and sheriff's certificate of sale, to-wit:

1. Deed from Powhatan W. Boudin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldin Exhibit 1, Tr. p. 420.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894, being Defendants Bouldin Exhibit 2, Tr. p. 421.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendants Bouldin Exhibit 3, Tr. p. 425.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendants Bouldin Exhibit 4, Tr. p. 426.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendants Bouldin Exhibit 5, Tr. p. 427.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. G. Gracy, dated April 16, 1900, being Defendants Bouldin Exhibit 5, Tr. p. 428.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendants Bouldin Exhibit 7, Tr. p. 430.

The said deeds and sheriff's certificate of sale were only material to prove the deraignment of title of defendants Bouldin to whatever interest Powhatan W. Bouldin and James E. Bouldin had obtained in the lands in controversy, by virtue of that certain deed executed to Powhatan W. and James E. Bouldin by John C. Robinson, of date November 19, 1892, Defendants Wise Exhibit 38, which heretofore, in Assignments II and III, we have fully considered. If this court holds that said deed from Robinson to Powhatan W. Bouldin and James E. Bouldin only conveyed the north half of the tract of land described in the 1866 location, then neither Powhatan W. Bouldin nor James E. Bouldin obtained any title to the lands described in the decree herein, and the defendants Bouldin, as the grantees of Powhatan W. and James E. Bouldin, under those deeds,

or as their heirs, acquired no title; and the objection to the introduction in evidence of said deeds, on the ground of their being immaterial, should have been sustained.

In this connection we desire to call attention to the fact that the Sheriff's certificate of sale, Joseph B. Scott, sheriff of Pima County, to Lionel M. Jacobs, dated June 16, 1894, Defendants Bouldin Exhibit 2, being one of the muniments of title of defendants Bouldin, supra, recites that the same was issued under an order of sale issued out of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in the action of Lionel M. Jacobs, as plaintiff, against Powhatan W. Bouldin, as defendant; being an entirely different judgment, and an entirely different order of sale, than the preceding judgment and order of sale in the case of Ireland and King vs. David W. Bouldin, defendant, and Leo Goldschmidt, administrator, defendant, heretofore considered.

Therefore, if this court holds that the deed from Robinson to Powhatan W. and James E. Bouldin, aforesaid, did not convey to them any interest in the tract of land described in the decree, being the lands described in the 1863 location, then the court erred in overruling the objections of defendants Wise to the introduction in evidence of each and all of said deeds and certificate of sale; because they were immaterial.

ASSIGNMENT OF ERROR XIII.

The court erred in permitting plaintiffs to introduce in evidence the instrument in writing executed by John S. Watts to William Wrightson, dated March 2, 1863, heretofore called the "Wrightson Title Bond," for the reason that plaintiffs deraign no title under said instrument; and in no event could the same be used to vary the description in the deed subsequently executed by John S. Watts to Christopher E. Hawley; and there was no evidence showing that Hawley himself claimed or deraigned any interest or title under said title bond.

Upon the trial of the case plaintiffs offered in evidence a certain instrument in writing, which we have called the "Wrightson Title Bond." Defendants Wise objected to the introduction thereof on the grounds that it was incompetent, irrelevant and immaterial, as fully set forth on p. 183-186 of the Transcript.

We have heretofore on pages 108-9 of this brief, under the title "The Wrightson Title Bond," set forth the instrument itself in full, and have there shown that it was utterly incompetent and immaterial, for the reason: in the first place, that Wrightson never assigned the same to Hawley, or to anyone else; and that even if he did, it was not competent evidence to aid in the description contained in the deed from John S. Watts to Hawley; for that deed stands alone as embodying the contract between the parties, and its terms cannot be altered by any previously executed instrument, which is not referred to or made a part of the deed.

We here refer to the argument made and the authorities cited on the foregoing pages of our brief, and we submit that the lower court erred in admitting the said Wrightson title bond in evidence.

**ASSIGNMENTS OF ERROR XIV, XV, XVI, XVII,
XVIII AND XIX.**

These assignments all relate to errors committed by the court in regard to excluding evidence pertinent to a consideration of whether or not Antonio Baca was a son, and his children heirs, of Luis Maria Baca. These assignments will be considered in our separate brief in regard to the 1-19 interest of Antonio Baca.

ASSIGNMENT OF ERROR XX.

That the court erred in decreeing that until the tract of land described in the decree and in the 1863 location was segregated from the public domain of the United States by the filing and approval of the Contzen Survey, no adverse possession or statutory prescription could commence to be initiated by any party to this action.

We have already considered this assignment of error in our consideration of Assignment of Error IX, of this brief, to which we refer as being pertinent to a consideration of the foregoing assignment.

ASSIGNMENT OF ERROR XXI.

That the court erred in decreeing that defendant Joseph E. Wise was vested with an absolute fee simple title to no greater interest than an undivided 1-38 interest in the tract of land described in the decree; and erred in not rendering its judgment that Joseph E. Wise was the owner in fee of an undivided 2-3 interest of the undivided 18-19 interest inherited by the heirs of Jahn S. Watts, less the 1-54 interest of said 18-19 interest, which was owned by Interveners, heirs of John Ireland, and in not quieting the title of said Joseph E. Wise thereto.

In considering the previous assignments of error we have shown that John S. Watts, owning on the 8th day of January, 1870, an undivided 14-19 interest in the tract described in the decree, being the tract described in the 1863 location; and also at that time being the owner of an undivided 14-19 interest in whatever title there was to the tract described in the 1866 location, by reason of the fact that he himself had requested the description of the tract to be amended by substituting the description of the 1866 location; did, on said 8th day of January, 1870, quitclaim to Christopher E. Hawley all the interest and title he then owned in and to the said tract described in the 1866 or amended location.

We have shown that thereafter, and on May 30, 1871, John S. Watts, by a deed of that date from the heirs of Baca to him, (Plaintiffs' Exhibit O, Tr. p. 197) acquired the remaining 4-19 interest in the tract de-

scribed in the 1863 location; so that when John S. Watts died, in 1876, he was the owner of all the interest theretofore acquired by him, except the 14-19 interest in the tract described in the 1866 location, which he had theretofore quitclaimed to Hawley.

The heirs of Watts inherited all of the tract described in the 1863 location, except an undivided 14-19 interest in the overlap, being that part of the tract which was overlapped by, or included within the limits of, the tract quitclaimed to Hawley, and Hawley acquired the 14-19 interest in this overlap.

The heirs of Watts, therefore, inherited an undivided 14-19 plus 4-19, or 18-19 interest in all the tract described in the decree, the 1863 location, except the "overlap;" as to which overlap Hawley acquired an undivided 14-19 interest; and the heirs of Watts the remaining 4-19 interest.

So that the title to the 18-19 interest to the entire tract described in the decree, which the heirs of Baca had, by their various deeds, conveyed to John S. Watts in his lifetime, was owned in fee, upon the death of Watts, in 1876, as follows:

Heirs of John S. Watts, 18-19 interest in all the tract exclusive of the overlap.

Heirs of John S. Watts 4-19 interest in the overlap.

Christopher E. Hawley 14-19 interest in the overlap.

Heirs of Antonio Baca 1-19 interest in the entire tract.

Transfers of the interest inherited by the heirs of John S. Watts.

The just mentioned 18-19 interest of the Watts heirs in the entire tract exclusive of the overlap; and their 4-19 interest in the overlap, was transferred, conveyed and is now owned, as shown by the record in this case, as follows:

(a) The heirs of Watts, by deed of September 30, 1884, (Defendants Wise Exhibit 16, Tr. p. 272) conveyed an undivided 2-3 of all their right, title and interest in tract described in the decree, to David W. Bouldin. David W. Bouldin thereby acquired an undivided 2-3 of the 18-19, or 36-57, interest in the entire tract exclusive of the overlap; and an undivided 2-3 of the 4-19 or 8-57 interest in the overlap.

The title to the interest inherited by the Watts heirs then stood.

Heirs of Watts, 1-3 of 1-18 or 18-57 to entire tract, exclusive of overlap.

Heirs of Watts, 1-3 of 4-19, or 4-57 interest in overlap.

David W. Bouldin 2-3 of 18-19 or 36-57 in entire tract, exclusive of overlap.

David W. Bouldin, 2-3 of 4-19 or 8-57 interest in overlap.

(b) David W. Bouldin, by deed of February 21, 1885, (Defendants Wise Exhibit 18, Tr. p. 312) con-

veyed an undivided 1-9 of all the interest which he had acquired from the heirs of Watts, to John Ireland and Wilbur H. King.

As the interest which Bouldin had acquired from the Watts heirs, as above just set forth was, 36-57 to all the tract except the overlap, and 8-57 in the overlap, the interest so conveyed by him to Ireland and King was 1-9 of 36-57 or 4-57 interest in all the tract except the overlap; and 1-9 of 8-57 or 8-513 interest in overlap.

The title to the interest acquired by David W. Bouldin then stood:

David W. Boudin:

Tract exclusive of overlap, 32-57 interest.

Overlap 64-513 interest.

Ireland and King:

Tract exclusive of overlap, 4-57 interest.

Overlap 8-513 interest.

(c) John Ireland and Wilbur H. King, by deed dated February 7, 1894, (Plaintiffs Exhibit Y, Tr. p. 219), conveyed all their interest in the overlap to Alexander F. Mathews; their interest in the overlap at that time being, as just above set forth, an 8-513 interest therein.

(d) The heirs, devisees and executors of Alexander F. Mathews, by deed dated February 8, 1907, conveyed all the interest acquired by Alexander F. Mathews in

his lifetime, to plaintiffs, Watts and Davis, (Plaintiffs' Exhibit W, Tr. p. 214), and under this deed plaintiffs have acquired the 8-513 interest in the overlap so conveyed to Alexander F. Mathews by Ireland and King.

(e) All the interest of David W. Bouldin, remaining in him after his deed to Ireland and King, of February 21, 1885, supra, was sold at sheriff's sale on July 31, 1895, as heretofore shown, to Wilbur H. King. The interest which David W. Bouldin had and so acquired by King was, as set forth in (b) supra: 32-57 interest in all the tract exclusive of the overlap, and 64-513 interest in the overlap.

(f) Wilbur H. King, by deed dated April 24, 1907, (Defendants Wise Exhibit 24, Tr. p. 320), conveyed all his interest in the entire tract to Joseph E. Wise. The amount of interest he then owned, and which Wise by this deed acquired, was as follows:

1-2 of the 4-57 interest conveyed to Ireland and King, by deed from David W. Bouldin, in the tract exclusive of the overlap, which is 1-2 of 4-57, or 2-57 interest. (See (b) supra).

All the interest which Ireland and King theretofore had acquired in the overlap, had prior to this deed to Wise, been conveyed to Alexander F. Mathews. (See (c) supra.)

Also, all the interest acquired by King under the sheriff's sale, in the suit against Bouldin, being 32-57

interest in all the tract, exclusive of the overlap, and 64-513 interest in the overlap.

So the interest acquired by Wise under his deed from King was:

2-57 plus 32-57, or 34-57, in the tract exclusive of the overlap.

64-513 interest in the overlap.

(g) The remaining 1-2 of the 4-57 interest conveyed by Bouldin to Ireland and King, was owned by John Ireland; for King and Ireland each owned 1-2 of the total 4-57 interest conveyed to them jointly by Bouldin, in his deed to them of February 21, 1885.

John Ireland died intestate on March 15, 1896, owning this 1-2 of 4-57 interest or 2-57 interest in the entire tract, exclusive of the overlap. He had conveyed his interest in the overlap, in his lifetime, to Alexander F. Mathews, as heretofore shown, (c) supra.

It was stipulated by all the parties to this action, that John Ireland died intestate; that his widow was entitled to the one-half of his estate, and that the following heirs were entitled to the other one-half in the following proportions, to-wit: Mrs. M. I. Carpenter 1-4, Pat C. Ireland 1-4, Ireland Graves 1-4, Anna R. Wilcox 1-8 and Eldredge I. Hurt 1-8.

So the 2-57 interest in the entire tract exclusive of the overlap, owned by John Ireland at the time of his death, descended as follows:

Mrs. A. M. Ireland, widow, 1-2 of 2-57, or 1-57.

Mrs. M. I. Carpenter, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Pat C. Ireland, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Ireland Graves, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Anna R. Wilcox, 1-8 of 1-2, or 1-16 of 2-57, or 1-416.

Eldredge I. Hurt, 1-8 of 1-2, or 1-16 of 2-57, or 1-416.

(h) Mrs. A. M. Ireland, widow of John Ireland, by deed dated April 8, 1907 (Defendants Wise Exhibit 25, Tr. p. 323), conveyed all her interest, being as above shown, 1-57 interest in the entire tract exclusive of the overlap, to Joseph E. Wise.

(i) John Nelson, Sheriff of Pima County, by deed dated October 5, 1914, (Defendant Wise Exhibit 26, Tr. p. 323; also p. 520) under the order of the Superior Court of Pima County, Arizona, in the case of Ireland and King vs. David W. Bouldin, conveyed to Joseph E. Wise, assignee and grantee of Wilbur H. King, all the right, title and interest which David W. Bouldin had on March 14, 1893, the date of the levy of attachment, in and to the tract of land described in the decree; being a curative deed under the sheriffs sale theretofore made to Wilbur H. King.

(j) The heirs of John S. Watts, by mesne conveyances, conveyed in 1899, and thereafter and in 1913,

all their interest to James W. Vroom, and Vroom thereafter conveyed to defendant Santa Cruz Development Company.

The interest which the heirs of Watts owned when they conveyed to Vroom, as shown (a) supra, was: 18-57 in entire tract exclusive of the overlap, and 4-57 interest in the overlap.

Present ownership of Baca Float No. 3, as shown by the record:

1. The undivided 1-19 interest inherited by the heirs of Antonio Baca in the entire tract, as decreed by the court, by Joseph E. Wise and Margaret W. Wise, each having 1-38 interest in the entire tract.

2. The remaining 18-19 interest is owned, as shown by the record in this case, as follows:

First. The tract exclusive of the overlap:

Joseph E. Wise—

Under deed from King (f supra) .	34-57
Under deed from Mrs. M. A. Ireland (g supra)	1-57
Total for Wise	—————35-57

Santa Cruz Development Company—

Under deed from Watts heirs (j)	18-57
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Intervenors, heirs of John Ireland—

Mrs. M. I. Carpenter	2-416
Pat C. Ireland	2-416

Ireland Graves	1-416
Anna R. Wilcox.	1-416
Eldredge I. Hurt.	1-416
Total for heirs, 8-416, or 1-57..	1-57
	<hr/>
Total, 18-19, or.	54-57

Second. The Overlap:

Plaintiffs, Watts and Davis—

Under Hawley deed, 14-19, or.	378-513
Under Ireland and King deed (d supra)	8-513
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Total for plaintiffs.	386-513

Joseph E. Wise—

Under deed from King (f supra)	64-513
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Santa Cruz Development Co.—

Under deed from Watts heirs (j supra), 4-57, or.	36-513
386 plus 64 plus 36 equals 486-513, or 18-19.	

The evidence in this case shows that the said 18-19 interest in said tract is owned as follows, to-wit:

Plaintiffs, an undivided 386-513 interest in the overlap, and no more.

Joseph E. Wise, an undivided 35-57 in all the tract exclusive of the overlap, and 64-513 interest in the overlap.

Santa Cruz Development Company, 18-57 interest

in all the tract exclusive of the overlap, and 36-513 interest in the overlap.

Intervenors, an undivided 1-57 interest in all the tract, exclusive of the overlap.

We ask this court to reverse the decree herein, and itself adjudge that the said Joseph E. Wise to be the owner in fee, in addition to said 1-38 interest aforesaid, to an undivided 35-57 interest in all the tract described in the decree, exclusive of the overlap; and to an undivided 64-513 interest in the said overlap.

And that the remaining interest be adjudged to be owned by the other parties, in the respective proportions as hereinabove set forth.

ASSIGNMENT OF ERROR XXII.

That the court erred in decreeing that the various recorded instruments purporting to inure to the benefit of the plaintiffs, or to the benefit of defendants Bouldin, or purporting to be in hostility to the title adjudicated in favor of said plaintiffs and said defendants Bouldin, be removed as clouds upon their title; and in removing the same as clouds upon the title so adjudicated to said plaintiffs Bouldin.

The questions involved in this assignment of error have been heretofore considered in our argument upon Assignments of Error I, II and III. We have shown that

plaintiffs and defendants Bouldin do not own the title adjudicated to them by the court; that the decree in this regard is erroneous; and if this be so, it necessarily follows, the court further erred in decreeing the removal of the alleged clouds on said title.

ASSIGNMENT OF ERROR XXIII.

That the court erred in decreeing that the temporary injunction theretofore granted plaintiffs against Joseph E. Wise, as modified, be made permanent as to the south half of the tract or parcel of land in said judgment and decree described; and erred in not dissolving said injunction.

The injunction referred to, which is made permanent by the decree, was a temporary injunction, issued pending the action, upon the application of plaintiffs, wherein the defendant Joseph E. Wise was enjoined, pending the action, from erecting fences on Baca Float No. 3; from interfering with any road, trail, path or other means, by which cattle have been or are accustomed to go to or return from the watering places on said Float; and requiring Wise to remove from such places any obstructions to the free access of such watering places, heretofore erected by him. This injunction was thereafter modified by permitting Wise to repair certain fences which he had theretofore erected on the Baca Float; but enjoined him from driving or placing any additional cattle upon that part of the Baca Float No. 3 which lies west of the Santa Cruz river.

This injunction the court has, by its decree, made perpetual. Tr. p. 538.

This is a suit to quiet title. There are no allegations in the complaint in regard to Wise fencing any of the lands; or in regard to his depriving plaintiffs of possession; or in regard to plaintiffs having any cattle; or requiring watering places; or anything of the kind.

Plaintiffs filed their complaint June 24, 1914. Thereafter they made application for a temporary injunction, wherein they alleged that they had brought suit to quiet title to Baca Float No. 3; that the defendants Wise—we will quote from the petition: “had threatened to build a fence around the said float and to enclose the same with said fence. That said defendants Wise had actually commenced the erection and construction of said fence, and are unlawfully attempting to enclose said lands, or a large portion thereof, with said fence, and unlawfully attempting to deprive the plaintiffs of the possession of said lands, or a large portion thereof; and that said acts on the part of said defendants Wise are without any authority of the plaintiffs, and against plaintiffs will, and without their consent; that the defendants Wise will, unless restrained by the order of the court, continue to build and construct such fence until such fence is completed entirely around said lands, or a large portion thereof, and that the building of said fence by said defendants Wise and the enclosing of said lands and premises by said fence will change the existing conditions of the property involved in this suit to the prejudice and disadvantage of

the plaintiffs, and contrary to, and in violation of the rights of the plaintiffs, and prevent the plaintiffs from securing the full benefit of the decision of this court, should the same be in their favor, and disturb the **status quo** existing at the time of the institution of this suit." Tr. p. 120.

And the plaintiffs then pray, that "an order to show cause why the defendants Wise, their agents, attorneys and representatives, should not be restrained from continuing or completing the building of said fence, or otherwise changing the **status quo** of said property, be granted plaintiffs, returnable," etc. Tr. p. 124.

Wise was served with notice to show cause, and in response thereto, on June 30, 1914, filed his affidavit in which he sets forth that he claimed a large undivided interest in the Baca Float No. 3; that he was, and for many years had been, in actual possession of a large part thereof; that he was engaged in the business of raising cattle, and grazed his cattle upon Baca Float, and for that purpose had at large expense erected a number of fences upon the tract, and had also erected a number of fences so as to keep the cattle of persons having no interest in Baca Float from off the same; and he denied that he threatened to enclose the entire Float with fences; denied he was attempting to deprive plaintiffs of possession of the Float; alleged that prior to the bringing of the present action he had constructed over thirty miles of fences on the grant, which greatly increased the value of the property; denied that the building of these fences, or the building of such as were

torn down, would disturb the **status quo** existing when the suit was brought; and averred that it was necessary that the fences, which he had theretofore erected, be kept intact, so as to keep the cattle of persons who had no interest therein from off the grant. Tr. p. 125.

On July 9, 1914, Wise filed a supplemental affidavit in said matter. Tr. p. 131.

It will be noted from the petition filed by plaintiffs, all they sought was to enjoin Wise from constructing a fence **entirely around** the lands in question, as it would deprive plaintiffs from the benefit of a decision in their favor, and disturb the **status quo** existing at the time of the institution of this suit. The court, however, on July 30, 1914, ordered an injunction to issue, to be in force pending the action, which went far beyond anything that the plaintiffs asked for in their petition. The injunction is as follows:

“ORDERED: That the defendant Joseph E. Wise, and George Wise, as agent of the defendants Jesse H. Wise and Margaret W. Wise, he, and they and each of them, their and each of their attorneys, agents, employes and other representatives, and each and every of them, are hereby, during the pendency of this suit, enjoined from changing the **status quo** existing on Baca Float No. 3 as it existed on the 23d day of June, 1914; and from erecting any fences in, upon or around said Float, or any portion thereof, or fencing, closing, stopping, or otherwise interfering with any road, trail, pathway, or other means by which cattle have been or are accustomed to go to or return from the watering places

on said Float, and to remove from such places any obstructions to the free access to said watering places, heretofore erected by them, or any of them; provided, that this injunction shall not extend to the land occupied by Joseph E. Wise at Calabasas, as his homestead." Tr. p. 134.

This injunction was so erroneous and burdensome, and so far outside of the injunction which had been asked for, that thereafter, and on September 28, 1914, Joseph E. Wise filed a motion for a modification of this injunction. In this petition for modification Wise, amongst other things, recites:

"That said injunction goes beyond said petition for an injunction filed by plaintiffs, and beyond the order of this court to show cause, and is indefinite and uncertain to such an extent, that this defendant, who is desirous of carefully observing the orders and injunctions of this court, does not and cannot know the scope and extent thereof, and said injunction goes further, and in effect, deprives this defendant of the right to use certain pastures which he has enclosed within the limits of said grant, and were enclosed a long time before the filing of said petition * * *

"This defendant for many years has been and still is, engaged in grazing cattle on the ranch, and all of said pastures are necessary for him to use in his business, but the injunction of this court restrains him from using the same, to his great loss and damage." Tr. p. 136-146.

He further shows that many of his fences have been

unlawfully cut by unknown parties and how the injunction restrains him from repairing the same, and so on. Tr. p. 142.

Thereafter, and on November 6th, 1914, the court made an order modifying the injunction which had theretofore been issued, in the following particulars, to-wit:

“That the said Joseph E. Wise be and hereby is permitted to repair and rebuild that certain fence on Baca Float No. 3 known as the ‘Garden Fence,’ which fence extends from a point on the easterly line of said Float, about a mile and a half north of the north line of the Sonoita Grant, and thus extends in a general westerly and southerly direction to the north line of the Sonoita Grant at a point about a mile and a half or two miles west of the east line of the Baca Float; and also that the said Joseph E. Wise may be permitted to repair and rebuild the fence around what is known as the San Caytano pasture; and that said injunction, as herein modified, shall be enforced until the further order of this court.

It is further ordered that any of the parties hereto may, at any time, apply to this court for a further or any modification of this injunction at any time, upon giving reasonable notice thereof.

It is further ordered that the said Joseph E. Wise shall not drive upon or place upon that part of Baca Float No. 3 lying west of the Santa Cruz river, any cattle or livestock beyond and in addition to the cattle and livestock which he has now running upon said part of said Float.

It is further ordered that the modification of the said injunction shall in no manner affect the possession, or claim of possession, of either party hereto, to the whole or any part of Baca Float No. 3, but said question of possession shall be determined without regard to said modifications." Tr. p. 147.

About one year thereafter, to wit, November 1, 1915, the court rendered its decree herein, and in that decree, amongst other things, adjudges:

"Seventh: That the temporary injunction heretofore granted against Joseph E. Wise, as modified, **is hereby made permanent** as to the south one-half of the tract or parcel of land hereinbefore described, and is dissolved as to the north one half thereof." Tr. p. 538.

The reason the injunction was dissolved as to the north half was because the court decreed plaintiffs to have no title whatsoever to the north half of Baca Float No. 3, and defendants Bouldin had made no application for an injunction.

But in this same decree the court adjudges that Joseph E. Wise **is** the owner in fee simple of an undivided 1-38 interest, and Margaret W. Wise the owner of an undivided 1-38 interest, in all of Baca Float No. 3; and the court decrees the plaintiffs to be the owners of the remaining 18-19 interest in the south half thereof.

Plaintiffs and defendant Joseph E. Wise are therefore, tenants in common, under the very decree which

enjoins Wise perpetually from pasturing his cattle on parts of the grant, and from erecting such fences as he may deem necessary, and from preventing cattle from the outside going to the watering places on the grant, and so on.

There are no allegations in the complaint, filed by plaintiffs in this case, in regard to Joseph E. Wise fencing, or threatening to fence, or to graze cattle, or in any way to use or occupy Baca Float No. 3; and no allegations upon which an injunction could be predicated.

In the relief prayed for by plaintiffs in their complaint, they only seek to have their titles quieted, and alleged clouds removed.

No issue is made by the pleadings in regard to Wise's right to erect fences, or to graze his cattle, or in any way to use the grant, as he, a tenant in common, has a right to use it.

Nor, upon the trial of this case, was one particle of evidence introduced on the subject of Wise's fences, or grazing cattle, or anything of the kind, except the meagre testimony of George Atkinson.

Atkinson testified as a witness on behalf of plaintiffs, that he went into possession of Baca Float No. 3 under the terms of a lease from plaintiffs on June 13, 1914; that Joseph E. Wise occupied a large part of the property; that he, Atkinson, fenced probably 80 acres; that Wise had got one pasture on the Baca Float of about 1000 acres, known as the Garden pasture; that Wise's

biggest pasture is Siquitona, with probably 4000 acres in it, and that Wise has absolute control of that pasture because he has got it fenced. That Wise also used a lot of other grazing land for his cattle; that he, the witness, was using more of this property now, than he did before the lease was given to him; that he had paid no money directly as rent under his lease; but had done work for Watts and Davis, which he probably would get credit for; that he agreed to pay pasturage, the same as he paid the government of the United States; that Wise did not give his consent to the fencing done by the witness. Tr. p. 231-233.

It is upon this testimony of Atkinson, and that alone, that the lower court decreed the injunction it theretofore had issued, should be made perpetual.

We have assigned this portion of the decree to be erroneous for the following reasons, as set forth in our Assignment of Error XXIII:

1. That this is an action to quiet title and remove clouds and not an action to restrain trespass, or to determine any rights of possession of the respective parties to the action, in the lande in dispute, and the decree of the court, restraining the right to possession and enjoyment of defendant Joseph E. Wise to the south half, or any part of said lands, is erroneous.

2. That no issue in regard to trespass or rights of possession or fencing is made or raised by the pleadings and no such issues were in the case.

3. That there is no testimony or evidence in the case which proves or tends to prove, that said Wise had been, or was doing, any of the matters or things, or threatened to do any of the matters or things which the court had enjoined him from doing.

4. That the only object of the said injunction when first issued, was to preserve the property in **status quo** pending said action, and said object having been attained, it was the duty of the lower court to have dissolved the injunction and to have dismissed the same, upon rendering its decree, which decree does adjudge and find that Joseph E. Wise has an undivided interest in all of said tract of land.

5. That the judgment and decree of this court is that said defendant Joseph E. Wise is a tenant in common with the plaintiffs as to the south half of the tract of land aforesaid, and that his interest is undivided, and the injunction in said decree perpetually enjoins said Wise from the exercise of his rights and the use and enjoyment of said property as a tenant in common with plaintiffs, and is against the law and is not supported by any of the evidence in the case.”

The decree in this regard is so manifestly erroneous that argument seems unnecessary.

We will leave it to counsel for Watts and Davis, appellees herein, who prevailed upon the lower court to make this injunction perpetual, to explain to this Honorable Court upon what basis such a decree can be sup-

ported in an action like this, which is a suit to quiet title; where there are no allegations in the pleadings, and no evidence introduced upon the trial which support this decree making the injunction perpetual.

We think a mere statement of the record shows this decree, making the injunction perpetual, is erroneous, and we ask that this part of the decree be reversed.

ASSIGNMENT OF ERROR XXIV.

That each and all of the errors hereinbefore assigned are also assigned for the benefit of Intervenors M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt, the heirs of John Ireland, deceased.

As these Intervenors have joined Joseph E. Wise and Lucia J. Wise in this appeal, each and all of the foregoing assignments of error, and the argument thereon, are also submitted in their behalf.

CONCLUSION.

From a consideration of the foregoing assignments of error, we submit that the lower court erred:

1. In adjudging plaintiffs to be the owners of an undivided 18-19 interest in the south half of the lands in dispute.

2. In decreeing defendants Bouldin to be the owners of an undivided 18-19 interest in the north half of said tract.

3. In adjudging that the statute of limitations did not run in favor of adverse possession until the approval and filing of the Contzen survey, in December, 1914, and in striking out the evidence of Joseph E. Wise as to adverse possession.

4. In making perpetual the injunction against Joseph E. Wise, enjoining him from such use of the land as his ownership as a co-tenant entitles him to.

5. That the lower court further erred, after permitting the introduction in evidence of the deed from the Watts heirs to David W. Bouldin, and the judgment and proceedings resulting in the sheriff's sale of the interest of said Bouldin to King, in sustaining objections to said documents. And as to all said matters which affect the ownership of the undivided 18-19 interest in said lands, we ask said decree to be reversed.

And, whereas, said deed from Watt's heirs to Bouldin, and the judgment and judicial proceedings, afore-

said, are a part of the record of this case; and as these documents and the deeds under which Joseph E. Wise and all the other parties to this suit deraign title, are also in the record, we ask this Honorable court itself to adjudge and decree that the tract of land in dispute in this action is owned, as heretofore set forth in this brief, in the following proportions, and by the following parties, to wit:

1. That the undivided 1-19 interest inherited by the heirs of Antonio Baca, is owned in fee as decreed by the lower court, to wit: 1-2 thereof in each Joseph E. Wise and Margaret W. Wise; each having thereunder 1-38 interest in the entire tract.

2. That the remaining 18-19 interest is owned in fee as follows:

First. The tract exclusive of the overlap.

Joseph E. Wise,	35-57 interest
Santa Cruz Development Company	18-58 interest

Intervenors, heirs of John Ireland,

Mrs. M. I. Carpenter,	2-416
Pat C. Ireland,	2-416
Ireland Graves,	2-416
Anna R. Wilcox,	1-416
Eldredge I. Hurt,	1-416 — 1-57 interest

Second. The tract we call the "overlap."

Plaintiffs, Watts & Davis,	386-513 interest
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Joseph E. Wise,

64-513 interest

Santa Cruz Development Company, 36-513 interest

Respectfully submitted,

SELIM M. FRANKLIN,

Attorney for appellants, Joseph E. Wise and Lucia J. Wise.

This brief is also submitted on behalf of Intervenors, appellants.

JOHN D. MACKAY,

Attorney for Intervenors, Mrs. M. I. Carpenter, et al.

